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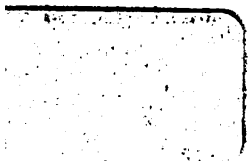
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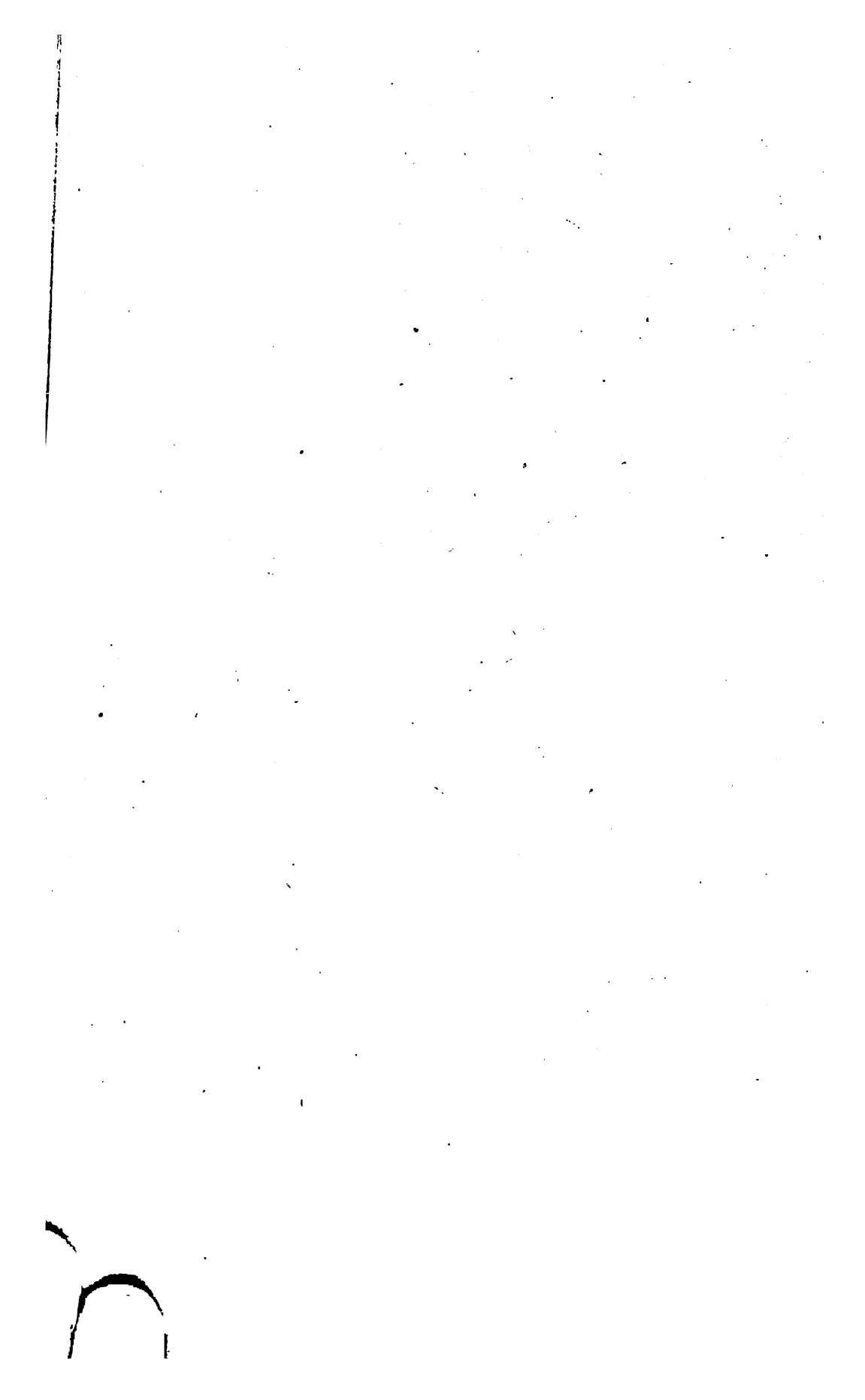
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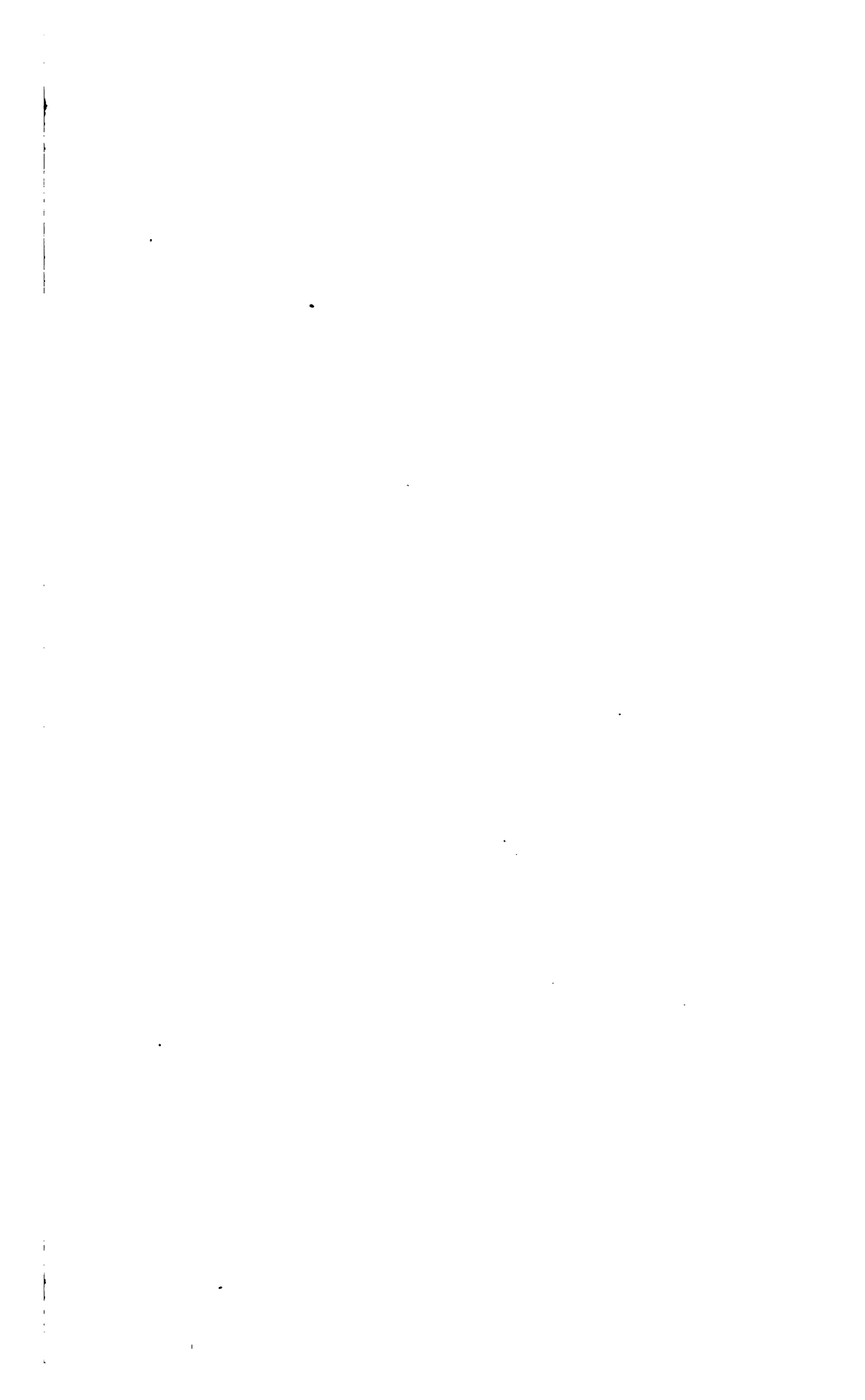
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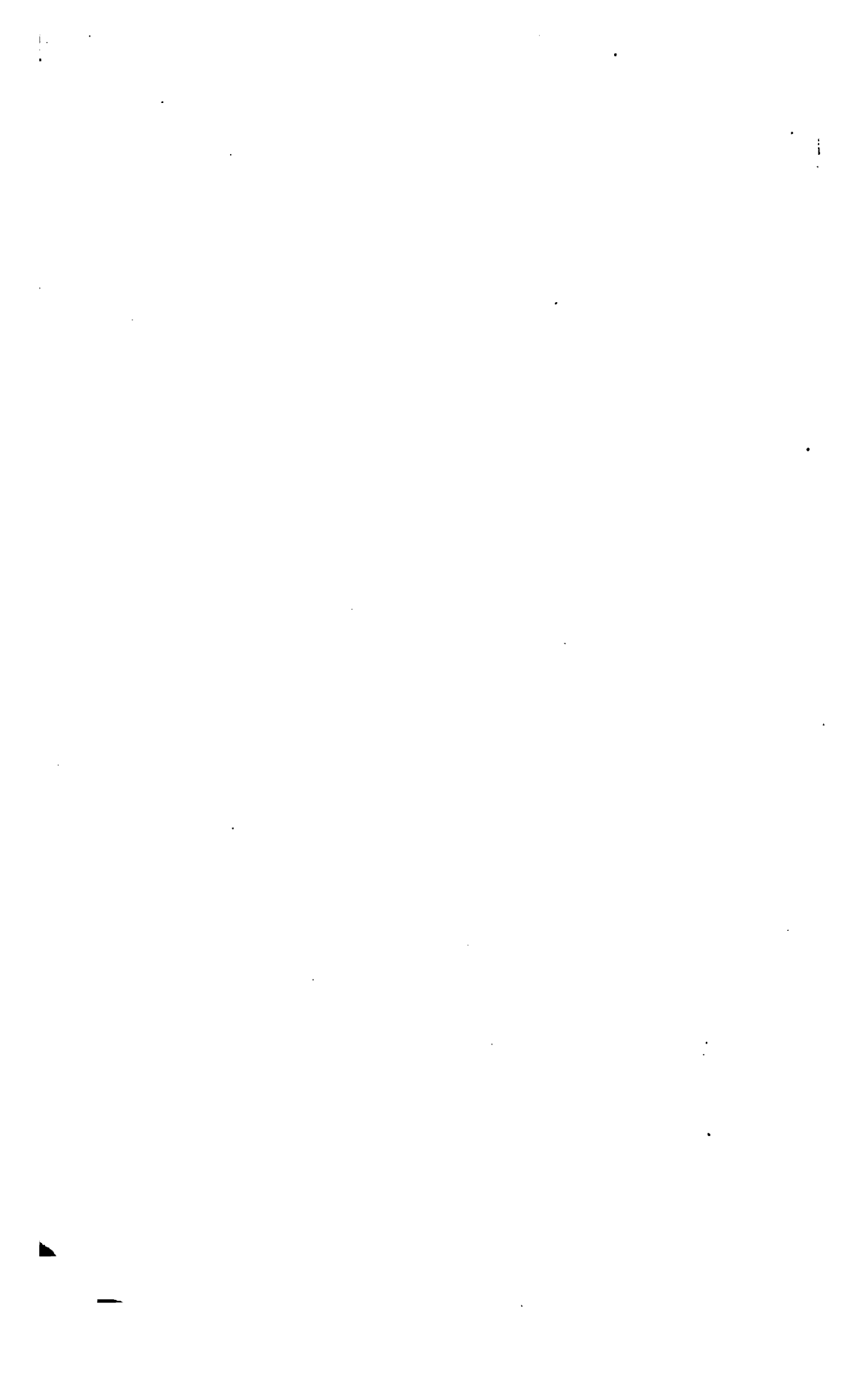
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A
T R E A T I S E
ON
C O N V E Y A N C I N G ;

WITH A VIEW TO ITS
Application to Practice :

BEING A SERIES OF
PRACTICAL OBSERVATIONS,

WRITTEN IN
A PLAIN FAMILIAR STYLE,

WHICH HAVE FOR THEIR OBJECT
TO ASSIST IN PREPARING DRAUGHTS, AND IN JUDGING OF THE OPE-
RATION OF DEEDS, BY DISTINGUISHING BETWEEN THE
FORMAL AND ESSENTIAL PARTS OF THOSE DEEDS,
&c. IN GENERAL USE :

BEING
A COURSE OF LECTURES.

WITH
AN APPENDIX OF SELECT AND APPROPRIATE PRECEDENTS.

THIRD EDITION, CORRECTED.

VOL. II.

BY RICHARD PRESTON,
OF THE INNER TEMPLE, ESQ.

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PREFACE

TO THE

*SECOND PART OF THE FIRST EDITION
OF THIS VOLUME.*

TO account for the delay in completing the second part of this volume would be as tedious to the reader as to the author. The reader may be assured, that the delay has given him the advantage of possessing this part of the work in a far more enlarged and perfect state than it would have been if published from the original MSS.

For the Index the Profession are in a great measure indebted to John James Park, Esq. a gentleman who will soon become a competitor for public favour in the line of his

Profession: and to William Lee, esq. I have to acknowledge his kindness, in having devoted a large portion of time in researches for authorities in support of the propositions advanced in the work. As the work was written without any previous collection of authorities, the completion has been retarded more on that, than on any other account.

A review of the Table of Contents will give to the reader a general outline and comprehensive view of the various interesting subjects he may expect to find in this volume.

PREFACE

TO THE

FIRST EDITION OF THE SECOND VOLUME.

A LONG interval has elapsed since the publication of the former volume of this work.

The second volume has been delayed longer than was intended. This delay has arisen from various causes, personal to the author, and which, if fully detailed, would, he is satisfied, be received as an excuse, by those to whom he has to apologize. His anxiety for the success of this volume, and his still greater anxiety not to submit to the public any thing that had not been well considered, have principally caused the delay.

Not content with the manuscript as originally intended for publication, each chapter has been enlarged, and the new arrangement which became necessary on that account, has caused

infinitely more labour and anxiety than the original composition.

The chapters now offered to the Profession treat of *declarations of uses, of fines, and recoveries*, also of *leases*; and there is added the first part of the chapter on that important subject, the assurance by *lease and release*. Something very extraordinary must happen to delay the publication of the remainder of this volume beyond Michaelmas Term. It will complete the chapter on lease and release, and give a few selected precedents with the indexes.

The importunity with which this volume has been demanded by the Profession, has induced the author to publish it in parts, and he has more readily concurred in this arrangement, that the purchasers of the former volume, who think fit to have part of the second volume, may be gratified; and that the Profession at large may be satisfied that the work is in a state of forwardness. To many also, it is more eligible to pursue a subject of this sort, by slow and gradual means, than to be burthened at once with a large book.

Whatever may be the opinion respecting the facility of discussing these three apparently simple subjects, of deeds leading and

deeds declaring the uses of fines, leases, and lease and release; the author can safely and truly assert, that these chapters have cost him more anxiety and actual labour, than the most abstruse subjects to be found in the former volume. For that volume he had an abundance of materials ready at hand; while for the present volume he has been under the necessity of searching very diligently for useful matter. And the chapter on lease and release has led to a more extensive investigation and research than he expected.

As might have been collected from the preface to the former volume, the chapter on deeds of uses has been written since the publication of that volume. This alone would not have greatly retarded the completion of the second volume. The principal difficulty has arisen with the chapter on lease and release. That chapter has been so much altered and so much enlarged, that it has required ten times more labour in the revision, than it did in its original formation.

The more the author has considered the plan he has undertaken, the more he has been impressed with a sense of its importance; and, in justice to himself, and to the persons anxious to possess this volume the

could not feel satisfied to send the work before the public, without making it as valuable as it was in his power. The chapter on lease and release has, in a particular manner, and very deservedly, excited in the Profession a desire to possess the second volume. This has been a great inducement to treat the subject more fully than was intended; that the Profession may not be disappointed, at least as far as such disappointment could be prevented by the author.

Considering the lease and release, from its general use, as the principal assurance in modern practice; and for that reason most deserving of having its nature and parts thoroughly understood, the author has exerted himself most strenuously, to make the principles on which it depends, and its application in practice, intelligible to the meanest capacity; and, while interesting the reader on this important subject, the author has endeavoured to elucidate the learning connected with this assurance, by those points which are incidentally brought under the notice of gentlemen, who prepare or consider the effect of deeds of this kind. In particular, he has always availed himself of any fair opportunity of inculcating the

knowledge of the doctrine of uses, since without understanding this branch of the law, no one can fully comprehend the operation or effect of one tenth part of the deeds which are prepared.

So much is to be found in approved books on the subject of ordinary leases, that to make the leading features, and great outlines, of this important and extensive head of the law, familiar to the student, and lay the foundation for his understanding the practical directions for preparing leases, and for avoiding those errors into which many fall, from a mistaken opinion, that any one can prepare a lease, has been the principal duty of the author. That no subject has afforded more discussion, or abounds with more nice distinctions, than the cases which have arisen between landlord and tenant, and between tenants and persons having an interest in impeaching their leases, are facts which are incontrovertible, and prove how mistaken is the notion which has been entertained on this point.

As far as the author can judge, this volume will be found more useful than the former. This opinion may be erroneous. It is formed, however, on the acknowledged utility of the subjects, and the fullest conviction that the

pains bestowed on these three chapters exceed all reasonable belief. This labour will, it is hoped, be ascribed to its proper motive; a wish to put into the hands of the student a book, which, though by no means expected to be free from error, may, in its general principles, and its practical directions, contribute to assist the rising generation of the Profession, and render the knowledge of conveyancing more simple, more general, and more correct. By confining the attention of the reader to useful points, and teaching that which deserves his first and most early attention, great progress is made, within a short time, in laying the foundation of more extensive knowledge, and for the correct application of that knowledge. The principal difficulty in studying the law, is to select the parts which are useful; and to distinguish out of the immense mass of contradictory decisions and opinions to be found in a lawyer's library, those points which are acknowledged to be sound law, from those which are over-ruled: or, from the qualifications added to them by subsequent decisions, stand in need of explanation. The students of the present day possess the incalculable advantage of having their difficulties, in this respect, materially relieved,

and their labours abridged, by the system of bringing before the public, treatises on particular subjects, in a connected series of observations; tracing the law to its principles; showing the rules which govern the subject; the cases which illustrate those rules; and the exceptions of which they admit; and the anomalies introduced by a departure from those rules and from those principles. By means of books of this sort, a student is enabled to become more familiar with the subject in a few months, than he otherwise could have done in as many years. For one, the present author feels infinitely indebted to the exertions of those gentlemen, who have so materially abridged the labours, and aided the researches, of the student and the practitioner; and laid the foundation for reducing the law into a system, which leads to sound and solid information; at the same time, assisting and encouraging industry. Without the labours of a *Piggot*, a *Fearne*, a *Butler*, a *Cruise*, and a *Watkins*, how little would the important subjects of which these gentlemen have treated, have been understood, compared with the knowledge now possessed even by very young men on these intricate subjects: and it is only by pursuing legal subjects through these and the many

other valuable treatises of modern date, that a student can expect to make himself master of any particular subject, within a reasonable period ; or to keep his knowledge, when acquired, within the reach of his memory, and applicable to practical purposes.

Truly happy will the author of this volume be, if his labours through a long Professional life, directed to promote the same object, and assist in attaining these happy results ; results in which society at large as well as the Profession is interested ; have been successful : and highly gratified will he be, if this volume shall, from its reception by the Profession, afford him the satisfaction of reflecting that his sacrifices, to fulfil his engagements with the public, have not, in their estimation, been made in vain.

THE DEDICATION
 TO THE
 FIRST PART OF THIS VOLUME
 WAS TO
LANCELOT SHADWELL, Esq.

LATE OF LINCOLN'S-INN, NOW DECEASED;

In these Terms.

THE great experience you have had, and the eminence you have deservedly attained, in the conveyancing department of the Profession, have made me anxious to place this volume of a work, so intimately connected with the subject of our pursuits, under your protection.

It was intended that the subjects which will be included in the third volume, should have possessed this advantage.

They had a better claim to this protection, from the circumstance of your having honoured them by a perusal, and kindly suggested some corrections; of which I readily availed myself.

But as the third volume cannot, with convenience, and consistently with other engagements, appear during the present year, I embrace the opportunity which the publication of this volume will afford me, of expressing the high sense I have always entertained of the kindness and liberality I have uniformly experienced in my professional intercourse with you, and of my admiration of the sound and extensive practical information you possess; the necessary fruits of a long and laborious employment of eminent talents, in the study and application of the rules of property; and in the discharge of the arduous duties of your profession, equally to your honour, and the advantage and satisfaction of the Profession at large and the public.

And with great respect,

I am, dear Sir,

Your very faithful and obliged servant,

RICHARD PRESTON.

TABLE OF CONTENTS

TO VOL. II.

OF DEEDS TO LEAD AND DECLARE THE USES OF FINES, RECOVERIES, &c.

	Page.
GENERAL outline of distinctions between	
1st. Deeds to lead uses,	
2d. Deeds declaring uses,	
3d. Conveyances to the intent that fines,	
&c. shall be levied to uses, &c.	1, 2
Uses cannot arise from a fine or recovery,	
unless it operates as a conveyance	2
I. <i>Of deeds—to lead the uses of fines</i>	7
The rules in the Countess of Rutland's case	
stated and examined	7, 11.
II. <i>Of deeds—declaring the uses of fines, &c. after</i>	
<i>they are levied</i>	26
Whether the deed must be indented	41
Of an intermediate conveyance be-	
tween the fine and declaration	42
Of a declaration, in opposition to a previous	
declaration, leading the uses, &c.	ib.
III. <i>Of declarations of uses in conveyances which</i>	
<i>pass an estate, &c.</i>	43
Subsequent fines, &c. necessarily operate as	
confirmations	45
Unless all persons concerned in interest agree	
to vary the uses while executory	46
Of resulting uses for want of an express decla-	
ration	65
Or a manifest intention	ib.
Of agreements for uses in deeds directed to	
other objects	69
IV. Parts of a deed of uses	70
Denomination or style of the deed	71
Date	72
Parties	73
Recitals	74
Testatum clause	76

	Page.
Form of covenants and circumstances to be observed - - - - -	79
1. Covenantor - - - - -	80
2. Covenantee - - - - -	90
3. Persons to levy a fine - - - - -	91
4. The time of levying - - - - -	92
5. To whom - - - - -	94
6. In what court - - - - -	98
Observations as to ancient demesne	
7. Of what parcels - - - - -	106
Mode of describing them	
8. Proclamations - - - - -	109
Of the declaration of uses.	
General form - - - - -	111
Its objects—	
By whom the declaration is to be made - - - - -	112
The assurances comprised by the declaration - - - - -	117
The parcels - - - - -	119
The mode of including the parcels - - - - -	ib.
Of the uses—	
That an use cannot be declared on an use - - - - -	120
Of uses contrary to the intention - - - - -	121
On leases generally - - - - -	124
Difference between	
1. Underlease - - - - -	ib.
2. Assignment - - - - -	ib.
Application to 1. Merger	
2. Surrenders - - - - -	126
3. Releases in enlargement - - - - -	127
4. Remedies by action of covenant - - - - -	ib.
Use of underleases in reference to attendant terms - - - - -	127
Of derivative terms - - - - -	129
Rule <i>cessante statu primitivo</i> - - - - -	129, 134
Difference between leases,	
1. At common law - - - - -	130
2. Under powers - - - - -	131
3. By tenant in tail - - - - -	ib.
4. By tenant for life with confirmation - - - - -	133
Loss of rents on an underlease by surrender, &c. - - - - -	134
Of leases which depend on	
1. Ownership - - - - -	135
2. Powers - - - - -	ib.
3. Enabling statutes - - - - -	ib.
Leases which	
1. Pass an estate - - - - -	136
2. Operate by estoppel - - - - -	ib.

TABLE OF CONTENTS.

xvii

	Page.
3. By an heir apparent - - - -	136
4. Owner of a contingent remainder -	ib.
5. Owner under an executory devise -	ib.
On fines operating by extinguishment instead of estoppel - - - -	137
On Roe ex dem. Bulkley v. Archbishop of York	ib.
Lease by several persons having several interests	141
A term for years may cease for a time, and be <i>in esse</i> for a time - - - -	142
Of leases.	
1. Of the possession - - - -	144
2. Of the reversion - - - -	145
3. By way of reversionary interest - -	146
Means by which leases may be created,	
1. For lives - - - -	147
2. For years - - - -	ib.
3. Under powers - - - -	ib.
When a deed is and when it is not essential -	148
Necessity of certainty of duration in leases for years - - - -	151
Forms of limitations in leases for lives - -	ib.
Doubted whether a lease for the lives of <i>A.</i> and of a person <i>unborn</i> would be good - -	153
Leases for <i>years</i> determinable on <i>lives</i> , of whom some are unborn, are good - - - -	155
Rules against abeyance - - - -	ib.
Exceptions to the rule,	
1. As to things created <i>de novo</i> - - - -	156
2. Uses - - - -	ib.
3. Trusts - - - -	ib.
4. Executory interests by will - - - -	ib.
5. Remainders - - - -	157
Necessity of certainty, viz. certain commencement, and certain continuance in leases for years - - - -	158
Of collateral determinations - - - -	159
Forms of commencement - - - -	160
Contrast between leases for lives and for years	162
1. As to grants <i>in futuro</i> - - - -	ib.
2. — mode of creation - - - -	ib.
3. — mode of transfer - - - -	ib.
4. — cesser for a time - - - -	164
5. — confirmation - - - -	165
6. — defeazance - - - -	166
7. — avoidance by condition operating partially - - - -	167
8. — mode of avoiding by entry, &c. -	ib.

	Page.
Difference as to some of these particulars between,	
1. Freehold leases at common law - - -	167
2. ——— by use - - -	ib.
3. ——— by executory devise - - -	ib.
<i>Formal parts of a lease,</i>	
1. Style - - - - -	168
2. Parties - - - - -	169
3. Consideration - - - - -	171
4. Grant - - - - -	172
An examination of what contracts amount to a lease, and to agreements only for a lease,	
5. Parcels - - - - -	178
6. Exception - - - - -	180
7. Habendum - - - - -	ib.
8. Reservation - - - - -	188
Rules respecting-rents and their reservation - - - - -	189
9. Conditions - - - - -	190
The various rules of distinction applicable to this point,	
10. Covenants - - - - -	204
circumstances to constitute the <i>substance</i> of covenants - - - - -	205

Of Lease and Release.

I. The theory of the law as it applies to a conveyance by lease and release - - -	207
Origin of the conveyance - - -	208
Feoffments and their advantages - - -	ib.
Circumstances under which alone a feoffment might be made - - -	ib.
Ancient power of the owner of the freehold to defeat the interest of termors - - -	ib.
Use of grant, and circumstances under which it might operate - - -	209
Necessity of attornment to a grant till altered by statute - - -	210
Release to a tenant did not require attornment by him - - -	ib.
A deed to a tenant may operate as a grant, when it cannot operate as a release - - -	211
Possession not an essential ground-work for a release - - -	ib.

TABLE OF CONTENTS.

xix

Page.

Examination of Littleton, Blackstone, Woddeson, Shep. Abr. and Touch. on this point - - - -	211
Possession to be read as vested interest - -	214
Difference between an <i>interesse termini</i> and a term - - - -	215
Of the doctrine applicable to <i>interesse termini</i> -	216
An estate in reversion or remainder may be enlarged - - - -	ib.
II. Principles on which this assurance depends -	217
1. It creates an estate to be enlarged -	ib.
2. It makes a grant in enlargement -	ib.
The use of the lease is to create a particular estate and privity - - - -	ib.
The difficulties which attended feoffments as to livery by the feoffor, or his attorney, to the feoffee or his attorney, and the want of seisin till livery, and which attended grants suspending the operation till attornment, led to the practice of lease and release - -	218
Serjeant Moor its supposed author - -	220
Circumstances which led to a general adoption of this mode of conveyance - - - -	221
Assistance from the statute of uses under which a bargain and sale gives an immediate vested estate - - - -	222
Difference of opinion at first entertained -	230
The lease operates as a bargain and sale -	233
Mode of pleading the lease and release -	ib.
Corporations convey by lease and entry, and a release thereon - - - -	234
Lease and release necessary only when a grant cannot operate - - - -	ib.
Rents, &c. may be conveyed by grant, or by lease and release - - - -	235
Examination of the doctrine that a lease and release countervail a feoffment - - - -	236
Difference between feoffment, and a lease and release - - - -	237
Leading points applicable to the lease - -	238
III. Of the parts - - - -	239
The lease and its use - - - -	ib.
The release - - - -	ib.
Both may be dated on the same day - -	241

	Page.
IV. Of a release grounded on a particular estate not created for the purpose of enlargement	242
Or a lease which is lost	ib.
Releases operating as grants	243
The term possession again explained	244
That the bargain and sale must give a vested interest, so as to divide the inheritance from the possession	245
V. Who may be the releasor and the releasee	ib.
I. In respect of personal qualification.	
All persons who are seised, &c. with observations respecting,	
1. Infants	248, 249, 250
2. Married women	246
3. Lunatics	ib.
4. Idiots	ib.
5. Persons deaf, dumb, and blind	ib.
6. King	
7. Queen regent and consort	251, 252
8. Corporation aggregate	251, 253, 254
9. ——— sole	253
10. Aliens	246, 253
11. Attainted persons	246, 259
12. Alienee of the crown	253
13. ——— of corporations	258
14. Husband and wife	262
15. Persons in the <i>per</i>	267
16. ——— <i>post</i>	ib.
17. Disseisor	ib.
Various observations connected with these persons	246 to 274
Conveyance by lease and release may be made to,	
1. An alien	263
2. An attainted person	ib.
3. A corporation	ib.
II. In respect of estate.	
1. Necessity of seisin	264
2. No seisin without a freehold	ib.
3. Disseisee	} disqualified
4. Discontinuee	
5. Tenant in tail	264, 272
6. King	266
7. Queen regent	ib.
8. Queen consort	ib.

TABLE OF CONTENTS.

xxi

	Page.
9. Corporation - - - -	266, 272
10. Villeins - - - -	267
11. Attainted persons - - - -	ib.
12. Other persons - - - -	ib.
13. Owner of vested estate - - - -	ib.
14. ——— contingent remainder - - - -	268
15. Interest by executory devise - - - -	ib.
16. ——— possibility - - - -	ib.
17. ——— disseisin - - - -	ib.
18. ——— discontinuance - - - -	ib.
19. Owners of contingent and executory interests in equity - - - -	269
20. ——— survivor of several persons - - - -	270
21. Persons to answer a description - - - -	ib.
22. Persons seised in Possession - - - -	ib.
23. ——— Reversion - - - -	ib.
24. ——— Remainder - - - -	ib.
25. ——— Jointenant - - - -	271
26. ——— Tenant in common - - - -	ib.
27. ——— Coparcener - - - -	ib.
28. ——— Tenant by entireties - - - -	ib.
29. ——— Tenant in fee - - - -	272
30. ——— Tenant in tail - - - -	ib.
31. ——— Tenant for life - - - -	ib.
32. ——— Termor for years or other chattel interest - - - -	ib.

VI. Who may be a releasee,

1. In respect of personal qualification; any person capable of a grant - - - -	273
2. In respect of estate,	
Persons having vested estates - - - -	ib.
1. In possession - - - -	ib.
2. In reversion or remainder - - - -	ib.
Owner of,	
1. <i>Interesse termini</i> - - - -	ib.
2. Right of entry - - - -	ib.
3. Executory interest - - - -	ib.
4. Seisin in law - - - -	274
5. Tenant in fee - - - -	ib.
6. ——— of a base fee from an estate-tail - - - -	275
7. Possibility of reverter - - - -	276, 277
8. Disseisee - - - -	277, 313
9. Discontinuee - - - -	277
10. Fee determinable by executory devise - - - -	278
11. Estates at will - - - -	284, 303, 304, 305
12. ——— for years - - - -	284, 287

	Page.
13. Estates for life - - -	284, 287, 289
14. ———— tail - - -	284, 285
15. ———— <i>in autre droit</i> - - -	284
16. ———— by copy of court-roll - - -	284, 289
17. ———— trust - - -	284, 289, 303
18. ———— Statute-merchant, &c. - - -	284, 292
19. Of mortgagor - - -	284, 289
20. ———— by sufferance - - -	284
21. ———— mere possession - - -	284, 287, 302, 312
22. ———— in dower - - -	284
23. ———— by curtesy - - -	ib.
24. Executors till debts paid - - -	285, 300
25. Right of dower - - -	285
26. Though no merger can take place - - -	ib.
Every particular estate may be enlarged - - -	302
Of grants in which tenant for life and remain-	
der-man join - - -	310
Entry under a void feoffment - - -	ib.
——— to receive livery - - -	311
Every disseisin generally is a disseisin for the	
fee simple - - -	312, 313
Special disseisin for a particular estate - - -	314, 317
Dispossession claiming a term - - -	315, 317
A particular estate cannot be created (though	
already existing, it may be gained) by dis-	
seisin, &c. - - -	321
In respect of privity.	
Assignee or } of particular tenant - - -	325
Representative } of reversioner - - -	ib.
Under-lessee - - -	ib.
New grantee of reversioner - - -	ib.
VII. General nature of privity between tenants - - -	327
Cases of immediate privity - - -	ib.
Privity,	
1. In estate - - -	ib.
2. In blood - - -	ib.
3. In representation - - -	ib.
4. In tenure - - -	ib.
Nature of privity required to lease and release - - -	328
Of privity notwithstanding mean estate - - -	338
Cases of immediate privity - - -	ib.
Because a derivative estate is discharged from	
its original privity - - -	344
Cases of want of privity.	
1. Because there is mere privity of tenure	
for the sake of remedy - - -	345

TABLE OF CONTENTS.

xxiii

	Page.
2. Because the estate is assigned - -	347
3. Because there is no estate, but only a right, or <i>interesse termini</i> - -	350
4. Because the estate is derived out of a mesne subsisting estate - -	352
5. Because the estate is determined -	358
Concluding observations.	
An instrument which cannot operate as a release may often operate as a grant, &c. -	ib.

VIII. Of the form of the lease.

Date - - - - -	361
Parties - - - - -	366
Consideration - - - - -	373
Grantor - - - - -	374
Words of grant - - - - -	376
Grantee - - - - -	377
Parcels - - - - -	380
Habendum - - - - -	385
Reservation - - - - -	387
Declaratory clause of the intent of the lease	389

IX. Form of release.

Date - - - - -	393
Parties - - - - -	ib.
In deed-poll - - - - -	394
Indentures - - - - -	ib.
Indenture between parties - - - - -	ib.
Testatum clause - - - - -	420
Consideration - - - - -	
Receipt - - - - -	
Name of grantor - - - - -	433
Omitted or mistaken - - - - -	432
Words of request, &c. grant, &c. - - - - -	438
Releasee, and words of succession - - - - -	439
Connection with habendum - - - - -	ib.
Inquiry whether recital is evidence, or estoppel	442
Form of recital of lease for a year - - - - -	444
Parcels - - - - -	446
And rules	
Words of reference, &c.	
General words	
As to mortgagees - - - - -	457
As to trustees - - - - -	ib.
As to maps - - - - -	459
Exceptions and rules - - - - -	462
Clause of reversion - - - - -	463

	Page.
Clause of the estate - - - - -	464
Clause of all deeds - - - - -	465
Habendum and distinctions - - - - -	467
Declaration of use - - - - -	473
Rules of law as to uses contrasted with rules of common law - - - - -	475
Resulting uses - - - - -	485
Trusts - - - - -	488
Covenants - - - - -	489

APPENDIX.

Forms of

I. Covenant to levy a fine; the most simple form	491
II. Declaration of the uses of a fine: being for the benefit of a purchaser - - - - -	494
III. Declaration of the uses of a fine - - - - -	499
IV. Feoffment made to gain the freehold by dis- seisin - - - - -	502
V. Feoffment and covenant to levy a fine - - - - -	505
VI. Demise of a term of years by way of mort- gage; being an under-lease by a trustee of at- tendant term, and a confirmation and lease by the reversioner - - - - -	508
VII. Confirmation of a lease to the assignee thereof, and defeazance reviving condition - - - - -	518
VIII. Lease, or bargain and sale for a year - - - - -	521
IX. Feoffment with covenant to levy a fine, and letter of attorney to receive, and letter of at- torney to give livery - - - - -	523
X. Form of grant of several attendant terms by way of under-lease - - - - -	529
INDEX - - - - -	532

NAMES OF CASES

AND

INDEX TO STATUTES

CITED
IN THIS VOLUME.

	Page.		Page.
Adam and Wilkinson -	383	Boys and King -	247
Altham v. Anglesea 3,	65, 66	Bracebridge v. Clowse -	150
Andrew's Case -	47	Brand's Case -	42
Anglesea and Altham 3,	65, 66	Bredon's Case -	277, 310
Argol v. Cheney -	64	Brigham and Goodhill -	482
Armourer and Wilson -	462	Brown and Herring -	3, 364
Atbury and Whetstone		Browne and Baxter -	174
(Lady) -	121	Brown and Surrey -	185
Atkinson v. Baker -	469	Brudnell's Case -	183, 184
Audely v. -	301	Brydges v. Brydges -	368
Badger v. Lloyd -	158	Buckhurst's Case -	466
Baldwin's Case -	442	Buckler's Case 137,	155, 269,
Bale and Stone -	365		442, 446
Baker and Atkinson -	469	Bugby and Cruso -	192
Barker v. Keats 145,	171, 217,	Bushel v. Burland, add	
220, 221, 222, 227,	229,	to. -	41
230, 231, 232, 239,	240,	Butcher and Richmond -	185
366, 373, 388, 391		Butler v. Duckmanton -	284
Barton's Case -	261	Butler v. Elton -	435
Barrington v. Horne -	84	Carhampton v. Carhampton	96
Bassett's (Arthur) Case -	32	Carter and Doe -	194, 195
Bath's (Bishop of) Case		Cartwright and Plowden	166, 385
	159, 160	Castle v. Dod -	488
Batty v. Trevilian -	42	Challener v. Davies	335, 336
Baugh and Blunden -	311	Cheney and Argol -	64
Baxter v. Browne -	174	Cheney v. Hall 5,	44, 47, 60
Backwith's Case -	24, 73	Child and Cooker -	407, 417
Bedel's Case -	227, 377	Chudleigh's Case -	314
Bedford's Case 132,	143, 164	Clare and Doe -	176
Biddulph and Shelburne -	277	Clarke and Kinnaston -	277
Birling and another, and		Clarke and Machel 56,	63,
Kirton -	317	64, 133, 236, 265,	272, 275,
Blake and Reynoldson -	147		330, 331, 358
Blunden v. Baugh -	311	Clayton v. Duke of New-	
Bond v. Seawell -	383	castle -	271
Bonis v. Holland -	254, 372		
Bourne and Hunt -	99		

	Page.		Page.
Clere's (Sir Edward) Case	42, 482	Dutton and Poole - - -	407
Clowse and Bracebridge	150	Edwards and Palmer - -	124
Complin and Goddard -	47	Edwin and Wooton - -	185
Comyns and Robinson -	121	Ellesdon and Trethewy -	435
Cook and Fountain - -	3	Elton and Butler - - -	ib.
Cooper v. Child - - -	407, 417	Emery v. Wase - - -	85
Cooper v. Franklin - -	265	Erles v. Lambert - - -	435
Coore and Doe - - -	176	Errington and Read - -	237
Copley and Gilbey 404, 405, 417		Farr's Case - - - -	377
Corbett's Case - - -	298	Faulkener and others, and	
Croker v. Kelsey - - -	58	Morse - - - -	271
Cromwell's Case 52, 364, 366		Fenhoulet and Scott - -	129
Crook's (John) Case - -	28	Fermer and Ferrers - -	364
Cross and Hogg - - -	442, 446	Ferrers v. Curson - - -	3
Crusoe v. Bugby - - -	192	Ferrers and Nightingale -	65,
Cudmore and Symonds -	277, 286		74, 113
Curson and Ferrers - -	3	Ferrers v. Fermer - - -	364
Darcy v. Durham (Bishop		Field v. Yea - - - -	466
of) - - - -	31	Fisher v. Wigg - - -	471
Davies and Challener 335, 336		Ford v. Lord Grey - - -	444
Day and Doe - - - -	365	Forrester and Goodright	270,
Defontaine and Drury -	363		277, 278, 326
Derby (Earl of) v. Taylor 166,		Fountain v. Cook - - -	3
179, 385		Fowler and Hodges - -	64
Derby (Earl of) Case -	465	Fox's Case - - - -	226, 233
Derwentwater's (Lord)		Fox and Lady Lanesbo-	
Case - - - -	58	rough - - - -	158
Devereux and Winter - -	85	Frampton and Nurse - -	411
Devonshire (Duke of) and		Francis v. Pack - - -	340, 343
Metham - - - -	383	Franklin and Cooper - -	265
Dobree, Ex parte - - -	387	Frith and Oates - - -	184
Dod and Castle - - -	488	Frogate and Sacheverel -	185
Doe v. Carter - - -	194, 195	Galliers and Doe - - -	194
Doe ex dem. Coore v.		Garret and Wilson - -	147
Clare - - - -	176	Gilbey v. Copley 404, 405, 417	
Doe ex dem. Odiarne v.		Glascock and Tooke - -	353
Whitehead 3, 5, 236, 272,		Goddard v. Complin - -	47
364		Goodhill v. Brigham - -	482
Doe v. Galliers - - -	194	Goodman v. Knights - -	417
Doe v. Tomkinson 270, 281		Goodright v. Searle 278, 279,	
Doe v. Day - - - -	365		280, 281, 283
Doe v. Greathead - - -	449	Goodright v. Forrester 270,	
Downman's Case 26, 41, 70, 71			277, 278, 326
Drake v. Mundy - - -	186	Goodright v. Mead 5, 44, 47,	
Drury v. Defontaine - -	363		61
Duckmanton and Butler -	284	Goodtitle v. White 278, 279	
Dumport's Case 196, 197, 198			281
Dusham (Bishop of) and		Goodtitle ex dem. Cast-	
Darcy - - - -	31	wick v. Way - - - -	175
		Greathead and Doe - -	449
		Green v. Wiseman - - -	228

	Page.		Page.
Hall v. Hardy - - -	85	Lamplugh and Short-	
Hardy and Hall - - -	ib.	ridge - - -	486
Hargrave and Sedgwick -	ib.	Lanesborough (Lady) v.	
Hatch and Holford - -	127	Fox - - -	158
Hedgly and Salter - -	415	Laxton and House - -	365
Helyar's Case - - -	321	Lee and Marsh - - -	301
Herring v. Brown - -	3, 364	Leeds (Duke of) and	
Heyward's Case 219, 225, 233,		Pugh - - -	387
244, 377		Lloyd and Badger - -	158
Hobart and Windamore -	401	Lloyd and Rees - -	292, 305
Hodges v. Fowler - -	64	Lower and Weale - -	93, 136,
Hogg v. Cross - -	442, 446	137, 158, 268, 269	
Holford v. Hatch - -	127	Lutwich v. Mitton 228, 229,	
Holland and Franklin's		232	
Case - - -	234	Machel v. Clarke 56, 63, 64,	
Holland v. Bonis - -	254, 372	133, 236, 265, 272, 275,	
Holland's Case - - -	379	330, 331, 353	
Hopkins v. Hopkins - -	121	Mackreth v. Symmons -	430
Horde and Taylor 24, 237, 363		Madison and Thurle - -	428
Horne and Barrington -	84	Mallorie's Case - - -	145
House v. Laxton - - -	365	Manning's (Matthew) Case 282	
Howard's Case - - -	387	Marsh v. Lee - - -	301
Humberston v. Humber-		Mead and Goodright -	5, 44,
ston - - -	154	47, 61	
Hunt v. Bourne - - -	99	Metham v. Duke of De-	
Jenkins v. Kemys - - -	93	vonshire - - -	383
Jenkins v. Young - - -	485	Mildmay's Case - - -	373
Jermin v. Orchard 125, 465		Mitton and Lutwich 228, 229,	
Johnson and Norwich,		232	
Mayor, &c. of - - -	319	Molyneux v. Molyneux -	383
Jones v. Morley - 14, 17, 20,		Montagu's (Lady) Case -	176
21, 23, 39, 41, 54, 73		Moody v. Moody - -	5, 47, 59
Jones and Roe - - -	269	Moore's Case - - -	269, 411
Ives's Case - - -	138	Morley and Jones 14, 17, 20,	
Keate and Barker - -	145, 171,	21, 23, 39, 41, 54, 73	
217, 220, 221, 222, 227,		Morris and Stephenson -	85
230, 231, 232, 239, 240,		Morse v. Faulkener and	
366, 373, 388, 391		others - - -	271
Kelsey and Croker - -	58	Mortimer's Case - - -	440
Kemys and Jenkins - -	93	Moxon v. Moxon - - -	64
Kennerley v. Orpe - -	127	Munday and Drake - -	186
Kidley and Salter - -	453	Nedham and Poole - -	154
Kinaston v. Clarke - -	277	Newcastle (Duke of) and	
King's (Auditor) Case -	439	Clayton - - -	271
Kirton v. Birling and		Nightingale v. Ferrers 65, 74,	
Trappes - - -	317	113	
King v. Boys - - -	247	Norwich (Mayor, &c. of)	
Knights and Goodman -	417	v. Johnson - - -	319
Lambert and Erles - -	435	Nurse v. Frampton - -	411
Lampet's Case - - -	268, 282	Oates v. Frith - - -	184

	Page.		Page.
Offley and Ward - - -	409	Searle and Goodright -	278,
Orchard and Jermin	125, 465	279, 280, 281,	283
Orpe and Kennersley - -	127	Seawell and Bond - - -	383
Ortred or Outram v.		Sedgwick v. Hargrave -	85
Round - - - - -	84	Selwyn v. Selwyn - - -	364
Pack and Francis -	340, 343	Seymour's Case 236, 264, 272,	
Painter and Sturgeon - -	175	353, 364	
Palmer v. Edwards - - -	124	Shaw v. Sherwood - - -	409
Parsons and Zouch	248, 250,	Shelburne v. Biddulph -	277
	375	Sherwood and Shaw - - -	409
Peake and Thrustout - -	65	Shortridge v. Lamplugh -	486
Pim's Case - - - - -	247	Snow and Waker - - -	64
Pinchard and Withers -	85	Sperling v. Trevor - - -	76
Plowden v. Cartwright	166, 385	Spyve v. Topham -	380, 433,
Poole v. Nedham - - -	154		439
Poole and Dutton - - -	407	Stanhope and Griffin - -	133
Popham and Roe - 64, 66, 74,		Stapilton v. Stapilton - 3, 4, 5,	
	116	11, 15, 20, 23, 44, 47, 48,	
Power and Roe - - -	95, 285	63, 272	
Pugh v. Duke of Leeds -	387	Stephenson v. Morris - -	85
Ramsbottom and others		Stevens v. Winning - - -	261
v. Tunbridge. Index		Sturgeon v. Painter - - -	175
<i>Recital.</i>		Stone v. Bale - - - - -	365
Read v. Errington - - -	237	Surry v. Brown - - - - -	185
Rees v. Lloyd - - - - -	292, 305	Symmons and Mackreth -	430
Reynoldson v. Blake - -	147	Symonds v. Cudmore - -	277,
Richmond v. Butcher -	185		286
Rigden v. Vallier - - -	471	Taylor and Earl of Derby	166,
Robinson v. Comyns - -	121		179, 385
Roe v. Jones - - - - -	269	Taylor v. Horde 24, 237, 363	
Roe ex dem. Bulkley v.		Thrustout v. Peake - - -	65
York, Archbishop of -	137,	Thurle v. Madison - - -	428
	140, 141	Tomkinson and Doe	270, 281
Roe v. Popham 64, 66, 74, 116		Tooke v. Glasscock - - -	353
Roe v. Power - - - - -	95, 285	Topham and Spyve	380, 433,
Roe v. Tranmer - - - - -	243		439
Ross v. Ross - - - - -	93	Tranmer and Roe - - - -	243
Round and Ortred or Out-		Treport's Case - - - - -	141, 170
ram - - - - -	84	Trethewy v. Ellesdon - -	435
Russel and —, add. -	127	Trevilian and Batty - - -	42
Russell and Webb	134, 357	Trevor and Sperling - - -	76
Rutland's (Countess of)		Tunbridge and Ramsbot-	
Case - - - - -	7, 16, 54, 71	tom, Index <i>Recital.</i>	
Sucheverel v. Frogate -	185	Twist's (Ann) Case - - -	96
Salter v. Kidley - - - -	453	Tyler and Greenwood - -	403
Salter v. Hedgly - - - -	415	Vale's Case - - - - -	35
Samm's Case - - - - -	394	Vallier and Rigden - - -	471
Say and Sele's Case - - -	365	Vandestone and Scuda-	
Scott v. Fenboulet - - -	129	more - 396, 398, 407, 417	
Scudamore v. Vandestone	396,	Vavasor's Case - - - - -	19
	398, 407, 417	Vincent and Habergam -	383

NAMES OF CASES.

xxix

	Page.
Waker v. Snow - - -	64
Ward and Offley - - -	409
Wase and Emery - - -	85
Way and Goodtitle - - -	175
Weale v. Lower 93, 136, 137,	158, 268, 269
Webb v. Russell - - -	134, 357
Week's Case - - -	252
Whetstone, Lady, v. At-	
bury - - -	121
White and Goodtitle 278, 279,	281
Whitehead and Doe ex	
dem. Odiarne - 3, 5, 236,	272, 364
Whiteleek's Case - 186, 187,	388
Wigg and Fisher - - -	471
Wilkinson v. Adam - - -	383
Wilson v. Armourer - - -	462
Wilson v. Garrett - - -	147
Windham's (Justice) Case 478	
Windsors v. Hobart - - -	401
Winning and Stevens - - -	261
Winter v. Devereux - - -	85
Wiscot's Case - - -	286
Wiseman's Case - - -	373
Wiseman and Green - - -	228
Withers v. Pinchard - - -	85
Wittingham's Case - - -	249

	Page.
Wooton v. Edwin - - -	185
Yea and Field - - -	466
York (Archbishop of) and	
Roe - - -	137, 140, 141
Young v. Jenkins - - -	485
Zouch v. Parsons - 248, 250,	375

STATUTES.

4 Ann. cap. 16. - 22, 219, 236	
4 and 5 Ann. cap. 16. 41, 117	
29 Car. 2. s. 6 - - -	21
29 Car. 2. cap. 3 - - -	136
Ib. cap. 7 - - -	362
13 Edw. 1. cap. 1 - - -	13, 276
24 Edw. 2 - - -	399
38 Edw. 3 - - -	415
39 Edw. 3. cap. 9 - - -	399
5 Geo. 1 - - -	59
9 Geo. 1 - - -	378
4 Geo. 2. cap. 28. s. 6 - - -	135
14 Geo. 2. cap. 28 - - -	358
21 Henry 8. cap. 15 - - -	209
27 Hen. 8. cap. 10 - 223, 224,	
225, 227, 228, 230, 246, 371	
32 Hen. 8. cap. 28 - 132, 135,	
136, 487	
10 & 11 W. 3. cap. 14 - 102	
11 & 12 W. 3 - - -	58

Note to end of page 196.

Such was the general understanding of the Profession down to the year 1817, though in Bacon's Abr. Lease, H. 3. pl. 1. the doctrine is quite in unison with the decision afterwards noticed. In Hilary term in that year the Court of King's Bench decided that a lessee, or to put the case more correctly, his *surety*, could not set up the act or default of the lessee as a defence against the lessor, on the ground that the lease had become void by the operation of a condition; declaring that in events which had happened the term should be void. Most of the cases on the subject were cited and urged by Mr. Gifford on behalf of the surety; but the court considered the point so clear against the surety, that it was unnecessary for Mr. Richardson to argue the case on the part of the lessor. This point may now be considered as settled, contrary to the conclusion drawn in page 196; and possibly this decision may induce the ulterior consequence, contrary to the former cases, that the lessor may dispense with the condition by treating the lessee as tenant after notice of the forfeiture. Many of the old cases cited by Mr. Gifford assumed that a condition of this description was part of the limitation, or more correctly speaking, part of the contract, giving to the lessee as well as to the lessor the right of putting an end to the lease; while the Court of King's Bench have treated the condition as distinct from the limitation, and as for the benefit of the lessor only; so that he has the option of taking or waving the advantage of a breach of the condition. In former times leases for years were considered as mere contracts for the possession, and might well be considered as for a chattel interest, so that the condition formed part of the terms of the bargain, while a condition annexed to an estate of freehold was collateral to the estate, and an entry or claim was necessary to avoid the estate for a breach of the condition. Even in a limitation to uses with a proviso of cesser, the proviso, especially if it be by way of conditional limitation, will operate without entry or claim, and *instantly*, and *ipso facto*, defeat the estate, as is already noticed in page 197.

It is fit to guard the Profession against the practice of termors for years making feoffments, to gain the freehold, though they first assign their terms to a trustee, with a view to protect against *forfeiture*, and to attend the inheritance.

A late decision of the court of King's Bench, (Hilary Term, 1817,) on a motion for a new trial, treated the term as *forfeited*. There was abundance of principle and even of decision to lead to that conclusion;—

In the first place it is a fraud on the part of the termor to attempt to gain the freehold.

2dly. The admission by the assignee of a title in the feoffee to the reversion is an *attornment* to a stranger; and by the rules of the common law attornment by a termor to a stranger is an abandonment of the tenancy, a destruction of the privity between the termor and the reversioner, and a forfeiture of the term.

Throgmorton v. Whelpdale, B. R. Hil. 9 Geo. 3. B. N. P. 96. *Doe ex dem. Foster v. Williams*, Cowp. 621. Peake, 196. *Espinasse*, 462. per Lord Redesdale, in *Hovenden v. Lord Annesly*, 2 Schoales and Lefroy, p. 625.

A
PRACTICAL TREATISE
ON
CONVEYANCING.

CHAP. I.

OF DEEDS TO LEAD, AND DEEDS TO DECLARE,
THE USES OF FINES.

THE books abound with various distinctions concerning the declaration of the uses of fines, recoveries, and other assurances. Some of these distinctions relate more immediately to *agreements* for fines to be levied, recoveries to be suffered, and the like; while others relate to deeds, declaring the uses of fines already levied, recoveries already suffered, or conveyances already made. Cases of the former description relate to that species of assurance, which is usually denominated *a deed to lead the uses of a fine*, &c.; and cases of the latter description relate to those deeds which are generally, and properly, styled *deeds to declare the uses of fines*, &c. There is a third species of assurance, partaking partly of the nature of a

deed to *lead*, and partly of the nature of a deed to *declare*, the uses of a fine, &c. as a conveyance made to the intent that a common recovery shall be suffered to uses; and it is to be lamented, that many treatises, valuable for the information they afford, have not adverted to this species of assurance, as regulated by other rules than deeds to *lead* the uses of fines, &c. Without understanding the precise nature of these several assurances, the rules of law by which they are governed, and the distinctions to which they give rise, it will not be easy to comprehend the books treating of these subjects. No use can arise in any deed operating at the common law, unless an estate of *freehold* is transferred, to supply a seisin to these uses. A fine or recovery must operate as a conveyance of an estate of freehold, as a preliminary step to a declaration of uses. As far as it is merely a release of *right*, or confirmation of *title*, no uses can be declared with effect, because no *seisin* passes; and as often as the fine operates on the equitable right, the uses which are declared will affect the equitable title only by varying or modifying that title. These uses will not have any influence on the legal estate, except so far as they charge that estate by way of *trust*. A deed to lead the uses of a fine or recovery, is not a conveyance of itself; it has no individual, or immediate opera-

tion on the seisin, or estate; it is merely a covenant or agreement to levy a fine, or suffer a common recovery; with a declaration, that the fine when levied, or recovery when suffered, shall enure to certain uses. This deed, and the fine when levied, or recovery when suffered, will operate as part of the same assurance(a). No estate passes till the fine is levied or recovery suffered; and in the mean time, no uses can arise for want of a seisin to supply or feed these uses.

2dly. A declaration of uses supposes, as the fact really is, the fine to be levied, or recovery to be suffered. Of course, the seisin has passed to the conusee in the fine, or the demandant in the recovery: and the uses remain in a dormant and inefficient state, for want of a direction giving them a definitive object. Till the uses are, by the declaration, called into operation, they will result to the former owner, or respective owners, according to the former ownership of the person, or those several persons, in such manner as has been noticed in the former volume. A long interval, even of many years(b), may

(a) *Stapilton and Stapilton*, 195. *Herring v. Brown*, Ventris, 368, 371. *Doe ex dem. Odiarne v. Whitehead*, 2 Burr. Curson v. Fermor and others, 704. Cro. Jac. 643. *Fountain v. Cook*, 1 Mod. 107. 1 Vent. 195. (b) *Altham v. Anglesey*, Gilb. Eq. Cases, 16.

elapse before this declaration is executed. From the moment the declaration is executed, the seisin will be bound with the uses, and these uses will arise from the seisin, transferred to the conusee in the fine, or demandant in the recovery; and not from that seisin which the former owner takes by way of *resulting use*. The seisin under that use cannot be transferred without a formal conveyance adapted to the circumstances of the estate of the party; while the seisin, transferred to the conusee in the fine, or the demandant in the recovery, may be effected and bound merely by a declaration of uses to arise out of that seisin.

3dly. In this species of assurance, a seisin or estate passes by the operation of the conveyance; the estate itself is transferred. Sometimes uses are declared, so as to arise immediately, as in *Stapilton* and *Stapilton(d)*. In other instances, the conveyance is merely to the intent that a fine shall be levied, or a common recovery shall be suffered, and uses are directed to arise, out of the seisin of the conusee in the fine, or the demandant in the recovery. Although the conveyance is made, and the fine is to be levied, to one and the same person; and although the fine and the conveyance, or the conveyance and the re-

(d) 1 Atk. 2.

covery, form part of the same assurance, the uses are to arise only from the time that the fine is levied or the recovery is suffered (e). In the language of Lord Mansfield, applied to a case of this description, the deeds must be considered as *executory*, till the fine is levied, and then the estate passes by the fine (f). It must be remembered, however, that the person who has already conveyed his estate, no longer retains any legal ownership. That ownership has passed by his conveyance; and he is effectually bound by the conveyance, as far as it is operative; and merely retains, in consequence of his former ownership, the power of giving a more complete effect to his conveyance, by rendering that assurance absolute, which was defeasible, or by rendering that ownership indefinite, which was at first determinable (g). Lord Mansfield's doctrine, that the deeds must be considered as executory, is to be read with reference to the rule, that for some purposes, the fine, recovery, and deed, are parts of the same assurance; they never were intended to deny, that the seisin passes by the conveyance. These preliminary observations lead to the consideration of the rules which govern,

(e) 2 Burr. 714.

(f) In *Doc ex dem. Odierne v. Whithead*, 2 Burr. 714.(g) *Stapilton v. Stapilton*,1 Atk. 5. *Goodright v. Mead*,3 Burr. 1703. *Cheney v. Hall*,Ambl. 526. *Moody v. Moody*,

1b. 649.

1st, Deeds to *lead* the uses of fines, &c.

2dly, Deeds to *declare* the uses of fines, &c.

3dly, Deeds of *conveyance* to uses, to be perfected by subsequent fines, &c.

Whether the agreement, or declaration, relates to a fine, or a common recovery, it is governed by the same rules. For that reason, cases applicable to either species of this assurance will be introduced, as equally relevant to the point requiring elucidation; or, at least, as often as any distinction arises, peculiarly applicable to either species of this assurance, that distinction will be noticed by way of caution against any error into which the reader might otherwise be led.

As to Deeds to lead the Uses of Fines.

The general rules which govern deeds of this description, are to be found in the *Countess of Rutland's* case (a). These resolutions are in the following terms:

First, "Although the indentures being
 "made for declaring the uses of a subsequent
 "fine, recovery, or other assurance, to cer-
 "tain persons, and within a certain time,
 "and to certain uses, are *but directory*, and
 "do not bind the estate or interest of the
 "land; yet if the fine, recovery, or other
 "assurance, be pursued according to the
 "indentures, there could not be any bare
 "averment against the indentures taken in
 "such case, that after the making of the in-
 "dentures, and before the assurance, by
 "mutual agreement of the parties, it was con-
 "cluded and agreed that the assurance should
 "be to other uses: but if other agreement, or
 "limitation of uses, be made by writing, or by
 "other matter as high or higher; then the
 "last agreement shall stand: for every con-
 "tract or agreement ought to be dissolved
 "by matter of as high a nature as the first

(a) 5 Co. 258.

“ deed ; *nihil tam conveniens est naturali æqui-*
 “ *tati, unumquodque dissolve eo ligamine quo*
 “ *ligatum est.* Also, it would be inconve-
 “ nient that matters in writing made by ad-
 “ vice and on consideration, and which finally
 “ import the certain truth of the agreement
 “ of the parties, should be controlled by aver-
 “ ment of the parties, to be proved by the
 “ uncertain testimony of slippery memory ;
 “ and it would be dangerous to purchasers
 “ and farmers, and all others in such cases,
 “ if such nude averments, against matters in
 “ writing, should be admitted.

Secondly, “ If the form of the indentures
 “ be not pursued ; as for the quantity of
 “ the land, or the time within which, &c. in
 “ these cases, and other like, where the
 “ indentures, be not pursued, averment,
 “ without writing, might be taken, that the
 “ fine, recovery, or other assurance, was to
 “ another use or intent than is contained in
 “ the indenture : for inasmuch as the inden-
 “ tures are not pursued, it is reasonable that
 “ the parties should be admitted to show
 “ the cause and reason why they were not
 “ pursued, by reason of the new agreement
 “ subsequent, which in such case might be
 “ as well by word, as by writing.

Thirdly, “ Although the indentures are not
 “ pursuant in circumstance of time, quan-
 “ tity, person, and the like ; yet if no other
 “ new mean agreement can be proved,

“ the assurance should be, in judgment of
“ law, to the use contained in the inden-
“ tures.

Fourthly, “ In the principal case, the fines
“ could not be directed by both the inden-
“ tures ; that is to say, by the first indenture,
“ to the use of Earl Edward, and Isabel
“ his wife, ‘ for their lives ;’ and by the se-
“ cond indenture, to the Earl, and the heirs
“ males of his body, with the remainders
“ over, limited by the second indenture ;
“ and so the fines to work upon both the
“ indentures (although peradventure such
“ was the intent of the parties) ; and that for
“ three reasons :

1st, “ The directions and declarations of
“ the first indentures were controlled and frus-
“ trated by the second indentures, and there-
“ fore the fines could not be directed by both.

2dly, “ The indentures import several dis-
“ tinct, and divers contracts and estates ;
“ that is to say, one to the Earl and Isabel
“ his wife, and to the heirs of the Earl ; the
“ other to the Earl only, and to his heirs
“ males of his body, with divers remainders
“ over : so that the fines ought for the manor
“ of Eykering to be directed, either wholly
“ by the first, or wholly by the second, with-
“ out any fraction or division of estates.

3dly, “ It would be against the words and
“ intent of both the indentures, to make a
“ hotch-pot and commixture of both, which

“ by their creation, were several and distinct
“ in time, in persons, and estates.”

The best course will be, to consider the several resolutions, and to examine how far the points in these resolutions are understood to be law at this day; and how far they are altered by statutable regulations, or by subsequent decisions.

In this case, Edward Earl of Rutland, who was seised in fee of the manor of Eykering, by indenture bearing date the 10th March, 21 Eliz. covenanted with Sir Gilbert Gerrard and Thomas Holcroft, that he (the Earl) would, before the end of Trinity term then next following, assure, by fine, or other assurance, the said manor to the said Sir Gilbert and Thomas in fee; with a declaration, that this fine should be to the use of the Earl and Isabel his Countess, and to the heirs of the Earl. On the 29th day of the same month, by another indenture, between the Earl, of the one part; and Lord Burghley, Sir Gilbert Gerrard, and others, of the other part; the Earl covenanted with the parties of the 2d part, to convey the said manor of Eykering, amongst others, to the parties of the 2d part, or to some or one of them, before the feast of the Annunciation of our Lady next following; with a direction that such assurance should be to the use of the said Earl, and the heirs male of his body; and for default of such issue, to the use of the heirs male of

the body of Thomas, Earl of Rutland, with divers remainders over. No fine, or other assurance, was levied or made by Earl Edward before the end of Trinity term. Afterwards, viz. on the 17th September next following, Earl Edward acknowledged a note of a fine of the manor of Eykering only, to Sir Gilbert and Thomas, and the heirs of Sir Gilbert. On the 18th of the same month, he acknowledged another note of a fine of the said manor of Eykering, amongst many other manors mentioned in the last indenture, to the parties of the 2d part in that indenture, and the heirs of Lord Burghley, one of those parties. And both fines were entered *in octabis Michaelmis* then next following. It was proved by witnesses, that Earl Edward, as well before the indentures, as after the fine levied, told them, that the Countess should have the manor of Eykering for her jointure.

This statement of the facts of the case will show the application of the several resolutions :

1. The first resolution admits that the indentures were only *directory*, and did not bind the estate or interest of the land. All the cases agree on this point. In particular, in *Stapilton v. Stapilton (b)*, already cited, Lord Hardwicke noticed, that it had been argued by the counsel, that if the 1st decla-

(b) 1 Atk. 8, 9.

ration of the uses is in general to prevail, purchasers of estates, though they have a recovery for strengthening their title, with a declaration of the uses of the recovery to themselves and their heirs, cannot be safe; for the vendor may defeat such declaration, by a precedent one to different uses. But his Lordship observed: "in such cases, I think, a recovery will not enure to make good such former declaration of uses, but only the uses of the purchase." From the context it is evident, that his Lordship's observation is to be confined to those instances in which the former declaration was merely executory, depending only on agreement, without any conveyance to secure the effect of that agreement. In a subsequent part of the case, his Lordship observed: "this case is different from those that turn only upon the point of the effect of a mere declaration of uses; for a mere declaration of uses subsists only upon the agreement of the parties, and in such cases where the agreement has been changed by mutual assent of all parties, there a recovery shall enure, to make good such last agreement or declaration."

But his Lordship proceeded to observe, "If the estate was vested, notwithstanding such declaration of uses, yet the recovery has always been held to make good such de-feasible estate; for the prior lease, charge, or estate, made by tenant in tail, is only

“ defeasible by the issue, by virtue of the
“ statute *de donis* (c), which was made to pro-
“ tect the issue against the alienation of the
“ tenant in tail ; therefore the issue could
“ avoid such lease, &c. but not the tenant
“ in tail himself. But when by the recovery
“ he has gained to himself a fee, all the rea-
“ soning for avoiding the estate made by
“ tenant in tail is gone, for the issue is
“ barred by the recovery.”

2. The next point of this resolution assumes, that when the circumstances of levying the fine, prescribed by the agreement of the parties, are observed, so that the fine is between the same persons, of the same parcels, and within the appointed time, no averment (that is, parol evidence) can be admitted to show that the fine was levied to other uses than those contained in the indentures. This branch of the resolution depends upon rules of evidence. As that which was stipulated by the indentures to be done, has been done, the law will not allow parol evidence to control the agreement, so as to admit that that which is certain, and depends on the solemn act of the parties, may be varied by evidence of less solemnity. It follows, that evidence merely by writing, as well as *parol evidence*, will be insufficient to vary the uses declared by *a deed*, when the circumstances prescribed

by that deed are observed. In *Jones v. Morley*(*d*), Lord Chief Justice Holt also states the law to be: "That if the fine had been levied "*pursuant to the covenant*, no parol averment "could have been allowed to declare the "uses, or that the fine was not to the uses "of that deed; and all parties had been es- "topped to aver the contrary by parol: but "by deed subsequent and *before the fine*, "other uses may be averred."—In these observations note that the second declaration must be *before* the fine is levied; and that the agreement of all necessary parties to the variation of the uses is to be understood.

3. The third branch of the resolution is, that the uses contained in a former instrument, either in writing, or attended with the solemnities of a deed, may be varied by another instrument, as solemn as, or more solemn than the former instrument. This is also admitted by the observations of Lord C. J. Holt, taken from *Jones v. Morley*. Thus, uses in a deed may be varied by another agreement contained in a deed; and uses contained in a mere writing may be varied by another instrument, merely in writing, or attended with the still greater solemnities of a deed.

4. This resolution supposes the fine to be between the same parties; for when there is a change in the parties, one of those cir-

(*d*) 1 Salk. 677.

circumstances, which excludes the admission of other evidence, is wanting; and no part of this resolution denies the right of the owner of the estate, to levy a fine to other parties, and to declare uses, which shall prevail against a declaration between the parties to a former instrument. By some means not easily to be accounted for, it has been understood, that no variation in the uses can be made without the concurrence of *all persons concerned* in interest. That qualification is correct, as applied to conveyances containing agreements under which uses are to arise; since the parties acquire an inchoate interest under that conveyance; but its accuracy is questionable, when it is applied to instruments merely directory; as deeds to lead the uses of fines, &c. The qualification is sanctioned, however, by the authority of Lord Hardwicke. In *Stapilton v. Stapilton* (c), he noticed, that it was said at the bar, that the declaration of the uses was in the power of the tenant in tail, and that he might declare new uses; and he observed, "I take that not to be law, for such subsequent declaration must be by all the parties concerned in interest." Without the context, it might have been supposed that his Lordship's observation was confined to the case before the court; namely, the case of a conveyance. But

(c) 1 Atk. 7.

it is impossible not to collect, that his lordship had the case of the *Countess of Rutland* in his contemplation, as warranting this opinion : for he proceeds to observe (*f*), that “ in the case of the *Countess of Rutland*, it is “ not laid down, that the tenant in tail might “ declare new uses ; but said, while it is directory only, new uses may be declared : and “ the meaning of that is, that as the uses “ must arise out of the agreement of the “ parties, the parties may change the uses : “ but that must be done by the mutual consent of all *the parties concerned in interest* ; “ and in that case, it was a mutual agreement “ of all parties.” The accuracy of this part of the report may be justly questioned. In the first place, the observation is not correct in supposing that, in the *Countess of Rutland's case* there was a mutual agreement of all parties ; or that there was the concurrence of all parties concerned in interest. The Countess was concerned in interest, and yet she did not assent to the second declaration. Nor will the case be relieved from its difficulty, by the answer that she was not a party to the first indenture. Holcroft, one of the intended conusees, was a party to that indenture ; and it does not appear that he joined in the second declaration. Nor indeed did the Court enter into any other dis-

quisition of the facts, than that as the first indenture was not pursued in its circumstances, the second indenture might govern the declaration of the uses of the fine. A still stronger ground for questioning the accuracy of this part of the report, is, that it is not consistent with the subsequent part of the same report; in which his Lordship declared his opinion to be (g), that "the recovery of tenant in tail will not enure to make good such former declaration of uses, but only the uses of the purchase." And in *Jones v. Morley*, afterwards cited, one of the persons interested under the first agreement, did not concur in the second agreement, and yet the second agreement prevailed. When the fine is levied pursuant to the first agreement, and to the persons who, by that agreement, are to be conusees in the fine, it is consistent with principle, and with the nature of uses, that the uses shall be governed by the first agreement. Before the statute of uses, the conusee would have retained the seisin or estate. The question in equity would have been, for whom he was a trustee; in short, who was to have that which at this day is termed the use. It is reasonable that no agreement behind his back should make him a trustee for persons who were strangers to the agreement. He, and those whose interest he sup-

(g) 1 Atk. 9.

ported, might contend that he was subject to no other uses than those declared by the agreement with him ; and the evidence would prove that he received the estate to those uses which were contained in that agreement. This seems to have been the origin of the rule, requiring the concurrence of all persons concerned in interest ; and in practice the case ought not to be carried farther than the principle from which it originated. Independent of this principle, it is difficult to understand the law on this point ; for, suppose *A.* seised in tail, or in fee, to covenant with *B.* to levy a fine as of next Michaelmas term, to various uses in strict settlement, under which he is to be tenant for life, with remainder to persons not in being ; and afterwards *A.* declares that the fine, when levied, shall enure to other uses ; what principle is there to prevent the second declaration of uses from governing the title ? Is not the fine levied to the second uses, and not to the first uses ; and is it not optional in *A.* whether he will be guilty of a breach of his covenant, or not ? And is the first declaration more than a covenant or agreement, leaving in *A.* the full ownership and power of disposition of the property to such uses as he shall think fit ? And if he may vary the uses by a new conveyance, why is the power of doing it by a new declaration to be denied to him ? It is difficult to comprehend the

force of any objection that can be urged against the validity of the second declaration, except such reasons as arise out of the learning of uses in their fiduciary state.

It is only while the agreement is directory that the uses can be varied. The moment the fine is levied, pursuant to an agreement, the estate is bound with the uses, and they are executed into estate ; and to alter or vary the state of the title there must be a *new conveyance*, under the seisin or estate, arising from the uses ; or an appointment in exercise of some power conferred by those uses. An attempt to vary the uses by a new agreement, so as to regulate the operation of the fine, will come too late.

Vavasor's case (h) is supposed to warrant a different conclusion ; namely, that a deed, executed after the suffering a recovery, may be controlled by a subsequent deed. That point certainly was decided in *Vavasor's case* ; but this case is not to be understood as an authority governing declarations of uses at this day. It had the peculiar circumstances of deciding the right under uses declared before the statute of 27 H. 8 ; and all that was determined by that case, is, that though the uses were declared upon the recovery, in favour of the husband and wife and their heirs, and a conveyance had been made to them and their heirs, these uses were changed

(h) Dyer, 307.

by a subsequent agreement between the husband and wife, so as to bind the estate of the husband, who survived his wife, with an use in favour of the heirs of the wife. In fact, the statute found the use, by virtue of the husband's agreement, in the heirs of the wife, and executed that use. This authority cannot then be applied to support the position, that an use once executed by means of a declaration, can be changed by a new agreement, without a conveyance, notwithstanding such agreement is with the consent of all persons concerned in interest.

The second resolution.—This resolution has been adopted from time to time, and is considered as law at the present day. In *Stapilton v. Stapilton* (i), the language of Lord Hardwicke is, "Before the Statute of Frauds, if the deeds declaring the uses had not been pursued, a parol declaration of uses would have been let in; but if there is a deed declaring the uses, and the common recovery is suffered accordingly, that would, before the statute, exclude a parol declaration of new uses." So in *Jones v. Morley* (j), the third resolution of the Court was, that "since the fine is not according to the deed, other uses may be averred, though they were declared by writing, and not by deed; for by that vari-

(i) 1 Atk. 7.

(j) 2 Salk. 677.

“ance, there is room or occasion given to
“inquire, and receive information, that the
“old agreement was relinquished; and by
“the same reason, the use of a fine may be
“declared by parol, upon an original agree-
“ment; it may now, as in this case, where
“the original agreement was relinquished.”
The case of *Jones v. Morley* is more remarkable for the circumstance, that the decision turned on a clerical error. A settlement was made by lease and release, and a use declared, till a jointure should be settled on the wife. In Hilary term 1665, by a deed dated in that term, the husband and wife covenanted to levy a fine in next Hilary term, evidently meaning the then present Hilary term, and the use was declared to the husband in fee. Two days after the former indenture, by a writing not attended with the solemnities of a deed, the husband and wife declared, that the uses of the former deed should be revoked, and the fine was levied as of the then present Hilary term; and the writing, and not the deed, governed the uses. One alteration has been made in this resolution by the Statute of Frauds and Perjuries, 29 Car. 2. In consequence of that statute the uses of a fine cannot be declared merely by parol. There must be a writing. The statute enacts, sect. 6, “that from and after the 24th day
“of June, all declarations or creations of
“trust or confidence, of any lands, tenements

“ or hereditaments, shall be manifested and
“ proved by some writing, signed by the
“ party who is by law enabled to declare
“ such trusts, or by his last will in writing, or
“ else they shall be utterly void and of none
“ effect.” With a proviso, that “ where any
“ conveyance shall be made of any lands or
“ tenements, by which a trust or confidence
“ shall or may arise, or result by the impli-
“ cation or construction of law, or be trans-
“ ferred or extinguished by act or operation
“ of law, then and in every such case such
“ trust or confidence shall be of the like
“ force and effect as if this statute had not
“ been made.” And the statute of 4th Anne,
c. 16, “ for the amendment of the law, and
“ the better advancement of justice,” after
reciting that “ it had been doubted whe-
“ ther, since the making of the said last-
“ mentioned act of parliament, the declara-
“ tions or creations of uses, trusts, or con-
“ fidences, of any fines or common reco-
“ veries, manifested by deed made after the
“ levying or suffering such fines or recoveries,
“ are good and effectual in law ;” enacted,
“ that all declarations, or creations, trusts,
“ or confidences, of any fines or common re-
“ coveries of any lands, tenements or heredi-
“ taments, manifested and proved, or which
“ shall hereafter be manifested and proved,
“ by any deed already made, or hereafter
“ to be made, by the party who is by law

“ enabled to declare such uses or trusts,
“ after the levying or suffering of any such
“ fines or recoveries, are and shall be as good
“ and effectual in the law as if the said last-
“ mentioned act had not been made.”

The third resolution also remains in force, not only unimpeached by any subsequent decision, but enforced by resolutions in other cases. Thus, in the cited case of *Stapilton v. Stapilton (k)*, Lord Hardwicke observes, “ it
“ is true, where there is an agreement to suf-
“ fer a recovery, and uses are declared ; if
“ the recovery is after suffered, though it va-
“ ries in point of time from the recovery co-
“ venanted to be suffered, yet if there is no
“ subsequent declaration of uses, the reco-
“ very will enure to the uses so declared.” And in the third resolution, in the case of *Jones v. Morley*, already cited, Lord Holt observed, “ that without such averment, the
“ fine should be intended to the use of the
“ first agreement, notwithstanding the vari-
“ ance.” In the report of the same case by Lord Raymond (*l*), the proposition is stated more distinctly in these terms : “ though
“ there is a variance between the deed and
“ the fine, yet, if nothing appears to the con-
“ trary, the fine shall be taken to be to the
“ uses of the deed, and in that case the
“ deed is not only evidence of the uses, but

(k) 1 Atk. p. 7.

(l) Lord Raym. 289.

“ the fine is, by construction of law, to the
“ uses of the deed.”

The fourth resolution proceeds upon the same principle as is to be found in *Beckwith's case*, cited in the first volume (m). This doctrine was discussed in *Taylor v. Horde* (n), and a different doctrine seems to have prevailed in that case. According to the decision of that case, several deeds may be construed as part of the same assurance; and the uses in each deed may have effect as far as they are consistent. The language of Lord *Mansfield* in that case was, “ as to the first
“ ground, that Lady Atkyns had no estate
“ for life, the whole argument depends upon
“ this proposition, that the lesser deed was
“ executed after the greater deed, and consequently the power to Sir Robert Atkyns
“ the father, to make a jointure, was extinguished by the fine levied in Trinity term
“ 1669. But the jury have not found the
“ fact, which was first executed. Both deeds
“ bear the same dates. They are both consistent. They are both manifestly but one
“ agreement, executed by different instruments, to answer different purposes, and
“ to suit (probably) the convenience of one
“ party, who was interested only in a small
“ part of the transaction. The fine levied in
“ Trinity term 1669, pursued both deeds, and

(m) p. 314.

(n) 1 Burr. p. 60.

“ comprises all the premises in the greater deed by which the powers were created.

“ It never could be the intent to revoke those powers at the instant they were created, by the lesser deed, which makes no mention of them ; or by a fine levied agreeable to the greater deed, in which they are contained.

“ Sir Robert Atkyns, who survived the transaction above 30 years, has shown by many acts that he understood the powers to be well created and subsisting.

“ If it was necessary, we ought to presume the lesser deed first executed, to support the clear intent of parties in a family settlement, made for valuable consideration ; for it is impossible to suppose they could really mean to revoke or extinguish these powers, and take this way of doing it. But in this case there is no room for presumption : the internal evidence of the thing itself speaks them to be one transaction ; and the same, to all intents and purposes, as if expressed in one instrument.”

Of Deeds declaring the Uses of Fines.

In deeds of this description, there is an interval between the time when the fine is levied, and the date of the declaration of the uses. The presumption of law is, that the use results to the former owners immediately after the fine is levied; and it is an acknowledged rule, that when there is no declaration of uses, or as far as the declaration of uses does not extend, or is ineffectual, the use will result to the former owners, according to their respective interests at the time when the fine was levied; but the law allows of a declaration of uses at any time in the life of those parties by whom the fine is levied. The law on this point was fully considered in *Downman's case* (a). In that case a recovery was suffered in pursuance of an agreement, and no uses were declared by that agreement. After the recovery had been suffered, and by a deed, reciting the recovery, uses were declared; and this deed, and the uses, were found by special verdict; and one of the questions moved and argued in the case, was, if the

(a) 9 Co. 7. b.

said indenture, *made* after the said recovery, was sufficient in law to direct and declare the uses of the said precedent recovery. And it was argued, “ that the said indenture was “ not sufficient to declare and direct the “ uses of the said precedent recovery, for five “ reasons and causes :—1st, When a recovery “ is suffered (it being without consideration,) “ immediately after the recovery the law “ adjudges it to be to the use of him who “ suffers the recovery, and his heirs ; then, “ when the use, in the case at bar, was vested “ in Peter Vavasor, immediately after the “ recovery executed before the said indentures made, this use so vested cannot be “ divested by any declaration or agreement “ subsequent ; and the deed indented shall “ not conclude the heir in this case, because “ it being subsequent, cannot by the law “ divest that which was vested immediately “ after the recovery had. And to this purpose they cited the books in 39 Ass. p. 3, “ & 46 E. 3. Assize, 357, where an infant “ brought an assize against *T.* of certain lands, “ the defendant said that *J.* uncle of the infant, whose heir he is, held the said land “ of him by homage, escuage, and four marks “ rent, and died seised ; and because the plaintiff was within age, he seized the tenements “ by reason of wardship : to which the plaintiff said, that the said *J.* held in socage, “ &c. : to which *T.* the defendant, said, to say

“ that you shall not be admitted, for the said
“ J. your uncle, upon a debate betwixt us,
“ acknowledged to hold the same land of us
“ by such services, by deed indented; and
“ demanded judgment, if he shall be received
“ to say the contrary, and showed the deed, &c.
“ and that case for difficulty was adjourned
“ into this court, and there it was adjudg-
ed that the said acknowledgment, or de-
“ claration by deed indented, should not
“ conclude the heir of J.; and the reason
“ of Thorp, Chief Justice, who gave the judg-
ment, was, because by the deed indented
“ other services could not be granted which
“ were not due before, wherefore take the
“ assize. So in this case at bar, the deed in-
“ dented subsequent shall not conclude the
“ heir of Peter Vavasor, because it cannot
“ divest the use, which was, by operation of
“ law, vested immediately after the recovery.
“ And they also cited 35 H. 6. 33 b. *John*
“ *Crook's case*, where the like acknowledg-
ment by deed indented was made, &c. and
“ estoppel pleaded; and it was adjudged that
“ the declaration by deed indented, for the
“ certainty of the services, should not bind
“ the heir of the tenant, who was party to
“ the said deed indented.—2dly, It was ob-
“ jected, that every declaration of uses upon
“ recoveries, fines, &c. of lands, tenements,
“ and hereditaments, ought to be certain,
“ otherwise there will be no certainty of

" inheritance ; and this certainty ought to
 " be chiefly in three things, &c. in persons
 " to whom ; in lands, &c. of which ; and in
 " estates by which uses shall be limited and
 " declared ; and if certainty fails in any of
 " them the declaration is not sufficient. But
 " here, in the case at the bar, there was not
 " any of these certainties when the recovery
 " was suffered ; and therefore the declara-
 " tion subsequent insufficient, *oportet quod*
 " *certæ personæ, certæ terræ, &c. &c. certi sta-*
 " *tus comprehendantur in declaratione usuum.*
 " The 3d objection was, that the limitation
 " and declaration of the uses ought to be com-
 " plete of itself, without any reference to in-
 " dentures or other writings to be made
 " afterwards ; for then it is but an imperfect
 " communication, and no complete declara-
 " tion ; and that it was but a communication
 " they alleged three reasons :—1, that the
 " uses were many, and of great variety of es-
 " tates : 2, that it concerned the establish-
 " ment of his inheritance of a great yearly
 " value in his name and family, and therefore
 " the intention of the parties never was to
 " leave it to the sliding and slippery memory
 " of man, which would be lost in a short time,
 " and especially when the said Elizabeth
 " (one of the plaintiffs) was his sister and heir,
 " before whom he preferred others of his
 " name and blood ; 3, several of the uses and
 " estates could not be limited with such

“ qualities and privileges by word without
“ deed, as the use limited to the said Peter
“ Vavasor (and to divers others for life), with-
“ out impeachment of waste, which privilege
“ to be dispunishable of waste none can have
“ by word without deed ; and therefore all
“ the words which passed betwixt the par-
“ ties before, or at the time of the recovery,
“ were referred to indentures to be made
“ thereof, and so but a communication, and
“ no complete agreement, *quia id perfectum*
“ *est quod ex omnibus suis partibus constat, et*
“ *nihil perfectum est dum aliquid restat agen-*
“ *dum*. The 4th objection was, that the said
“ indenture was but directory, and declara-
“ tory of the uses of the recovery, and was not
“ of any force to raise or create any use : then
“ when the issue is, whether the said recovery
“ was suffered to the said uses mentioned in
“ the bar, the said indenture subsequent
“ might, peradventure, be good evidence to
“ persuade the recognitors of the assise that
“ the said recovery was suffered to the said
“ uses ; but of itself, being subsequent to the
“ recovery, it is not sufficient in law to direct
“ the uses of the precedent recovery, unless
“ by the agreement of the parties the uses
“ were so declared before or at the time of
“ the recovery ; and then the declaration pre-
“ cedent, and not that which was subsequent,
“ is the declaration which binds in law, and
“ the subsequent is but evidence to prove

“ the precedent : and therefore, if the said
“ Edward Vavasor had pleaded the said re-
“ covery, and pleaded also the indenture sub-
“ sequent, to the effect as the recognitors
“ have found it, that would be altogether
“ insufficient, for the indenture subsequent
“ is but the report and evidence of a former
“ thing, &c. ‘ that the true meaning of all
“ the said parties, &c. at the time of the said
“ recovery, &c. was, that the said recove-
“ rors, &c.’ ; and evidence shall never be
“ pleaded, because it tends to prove matter
“ in fact, and therefore the matter in fact
“ shall be pleaded ; and if that is denied, the
“ evidence is to be given to the jury, and not
“ to the court. And therefore, in 9 E. 3.
“ 5, b. and 6, a, John Darcy brought a *quare*
“ *impedit* against the Bishop of Durham,
“ of a disturbance to present to the church
“ of Simondsbury, and declared that King
“ Edward 2, was seised of the manor of
“ Wreckes in Tindall, to which the advow-
“ son is appendant, and presented, &c. and
“ made the descent of the manor to the king
“ that now is, who gave the manor, with the
“ fees and advowsons, to the plaintiff, and his
“ heirs, &c. ; to which the defendant said,
“ that the advowson is not appendant to the
“ manor, &c. ; to which the plaintiff replied,
“ that to this averment the defendant should
“ not come ; for we say that one Edward, late
“ king of Scotland, was seised of the manor
“ of Wreckes, and of the advowson, and pre-

“ sented to the church as appendant; and
“ showed how afterwards the manor came
“ to the hands of King Edward, the grand-
“ father, by forfeiture of John Baliol; and
“ showed how afterwards the kings presented
“ as appendant to the manor: wherefore the
“ plaintiff did not conceive that against so
“ many presentments as appendant, that the
“ defendant should be received to say that
“ the advowson is not appendant. And Sir
“ William Herle, who gave the rule, said the
“ presentments of which you speak are but
“ evidence to the jury that the advowson is
“ appendant, and evidence shall not oust the
“ defendant of his plea. The 5th and last ob-
“ jection was, that if these declarations sub-
“ sequent should be sufficient in law to de-
“ clare the uses of a precedent recovery, for
“ as much as they will be restrained to no
“ certain time, and therefore may be made
“ many years after, by that means estates,
“ leases, and interests in and out of the lands
“ *vested in the mean time*, would be thereby
“ defeated, which would be full of mischief
“ and inconvenience. And the *case of Ar-*
“ *thur Basset*, which you may see reported by
“ the Lord Dyer, 3 & 4 Ph. & Ma. 136, that
“ indentures made four years after a recovery
“ were held sufficient to declare the uses of a
“ precedent recovery, was agreed to be good
“ law; for in the said *case of Basset* the recovery
“ was suffered in 16 H. 7, and the indentures
“ made anno 20 H. 7, (which was long before

“ the statute of transferring of uses into pos-
“ session) at which time an use, being but a
“ thing in confidence, might be directed and
“ altered according to the intention of the
“ parties. And after the case had been often
“ argued by the serjeants at the bar, the case
“ was argued by the justices at the bench ;
“ and it was unanimously resolved by all the
“ justices of the bench, that the said inden-
“ ture subsequent was sufficient to direct
“ and declare the uses of the precedent
“ recovery against the said Peter Vavasor
“ and his heirs ; for so it is concluded and
“ declared by the deed indented, that the
“ intent and true meaning of all the parties
“ now is, and at the time of the said re-
“ covery was, that the said recoverors, &c.
“ should stand seised, &c. to the only uses
“ and intents by these presents set forth
“ and declared, and to no other use, intent
“ or purpose ; against which express affirma-
“ tion and declaration *by deed indented*, the
“ said Peter or his heirs shall never be ad-
“ mitted or received to say, that no such
“ uses were declared at the time of the said
“ recovery, but that the said recovery, not-
“ withstanding the said subsequent decla-
“ ration, shall be construed and adjudged,
“ by force of an use implied by operation of
“ law, to be to the use of the said Peter and
“ his heirs : but this declaration by the said
“ deed indented has this operation in law
“ against the said Peter and his heirs, that

“ there was a present, certain, and complete
“ agreement and declaration of the said uses
“ at the time of the said recovery, for so the
“ indenture expressly purports ; and there-
“ fore all that has been objected, that the
“ declaration ought to be precedent, or
“ present and certain, and complete, and
“ not as a communication with reference to
“ matter to be put in writing afterwards,
“ was well argued : but now this deed in-
“ dented, in judgment of law, doth import
“ and witness against the said Peter Vavasor
“ and his heirs, for as much as nothing
“ appears to the contrary, that there was
“ a certain and complete declaration of uses
“ at the time of the said recovery ; and this
“ stands upon pregnant and apparent rea-
“ son ; for in as much as Peter and his
“ heirs are only to take advantage for want
“ of declaration of uses, reason requires that
“ this declaration of the said Peter, by *his*
“ *deed indented* should stand against him
“ and his heirs ; and this case is not like
“ the said cases in 39 Ass. and 46 E. 3. cited
“ before ; for in such case, if the lands were
“ held before in socage, the tenant could not
“ create or grant knight’s service which was
“ not due before ; and in the record the
“ infant was not made heir to J. But here
“ without question, Peter Vavasor, the te-
“ nant of the land, might at the time of
“ the recovery, limit what use he would ;
“ and Elizabeth is heir to Peter : and the

“ reasons of the book of 35 H. 6. are, 1,
“ The heir in such case was not bound,
“ because the words of the charter were but
“ by way of recital; 2, That the words of
“ the deed indented were all the words of
“ the lord, and not of the tenant, the heir
“ of whom should be bound; and that the
“ brother of the half blood was not heir to
“ the tenant, who was party to the deed.
“ But in our case, 1, It is not by way of
“ recital, but an express affirmation and de-
“ claration; 2, It is the acknowledgment
“ and declaration of the tenant of the land
“ itself, and the said Elizabeth, one of the
“ plaintiffs, is heir to Peter Vavasor. Vide
“ 10 E. 3. 22, 24. *Rob. de Vale's case*. And
“ as to the objection which was made, that
“ the said privilege to be without impeach-
“ ment of waste cannot be without deed, &c.;
“ to that it was answered and resolved, that
“ if it was admitted that a deed in such case
“ should be requisite, yet without question
“ all the estates limited would be good;
“ although it is admitted, that the clause
“ concerning the said privilege would be void.
“ And therefore if a man enfeoffs one by parol
“ to the use of A. for life, without impeach-
“ ment of waste, with divers remainders over,
“ admitting that the clause of without im-
“ peachment of waste, in such case should
“ be void, yet the estate for life with the
“ remainders over is well executed. And a
“ difference was taken between *indentures*

“ *precedent*, which shall *direct* the uses of a
“ subsequent recovery, and *indentures sub-*
“ *sequent* ; for when precedent indentures
“ are made, and afterwards a recovery
“ follows accordingly, there no averment
“ can be taken by parol, that the recovery
“ was to other uses than are declared in the
“ indenture ; for *nothing vests in any till the*
“ *recovery is had* : and in such case a declara-
“ tion *by parol* will not control the decla-
“ ration *by deed* : but against an indenture
“ subsequent, declaring the uses of a reco-
“ very precedent, there averment may be
“ taken, that other uses than in such indenture
“ are declared were expressed and limited
“ before and at the time of the recovery,
“ because *by such limitation the use and estate*
“ *was vested according to such limitation, which*
“ *cannot be divested by any declaration by inden-*
“ *ture subsequent*. It was also resolved (as
“ appears before) that the said declaration
“ subsequent by deed indented, should stand
“ good against the said Peter Vavasor and
“ his heirs ; for as much as appeareth there
“ was no other declaration of any other use ;
“ but if, after the recovery had, Peter Vava-
“ sor had sold, or given or charged the lands
“ to others, which would be defeated and
“ annulled by the declaration subsequent,
“ there such subsequent declaration of itself
“ should not subvert the mean estates,
“ charges or interests, unless it could other-
“ wise be proved that by the certain and

“ complete agreement of the parties, the
“ recovery was had to such uses ; for by
“ judgment of law such declaration subse-
“ quent shall be sufficient, when no other
“ certain and complete declaration or limi-
“ tation of any other use, either at the time
“ or before the recovery, be made, or any
“ estate or interest mesne be vested ; and
“ as when a common recovery is suffered
“ without consideration, it is in judgment
“ of law, without any proof, to the use of
“ him who suffers the recovery, if nothing is
“ proved to the contrary ; so when such sub-
“ sequent declaration (as in the case at bar)
“ is made, it shall be sufficient of itself,
“ without any other proof of the declaration
“ of the same uses, either before or at the
“ time of the recovery, if no other limitation
“ of the use was made, nor any mesne estate
“ or interest of any other thereby defeated.
“ And because the intention of the parties
“ is the direction of uses, in the argument
“ of this case, many cases were put, where
“ an act subsequent shall declare the inten-
“ tion of a general act precedent ; as, if tenant
“ in tail has issue two daughters, and dies,
“ and the elder enters into the whole, and
“ afterwards makes a feoffment thereof with
“ warranty, this is a lineal warranty for
“ one moiety, and a collateral warranty for
“ the other, for the feoffment subsequent
“ shall declare the intention of the general

“ entry, that it was only for herself, or
“ otherwise it would be a warranty which
“ commenced by disseisin, for one moiety ;
“ and therewith agreeth Lit. cap. Gar. s. 160.
“ So if the lord comes upon the tenancy, and
“ takes and drives away an ox, if he im-
“ pounds it, the taking shall be adjudged
“ for a distress ; but if he kills the ox, this
“ act subsequent shall declare his intention
“ *ab initio*, and shall make him a trespasser ;
“ and therewith agree 12 Ed. 4. 8. b. 28
“ H. 6. 5, &c. And as to the 4th reason
“ or objection, which was made, that it
“ was but matter of evidence, tending to
“ prove to what uses the recovery was had,
“ that has been answered before, that in
“ judgment of law it is sufficient to declare
“ the use, when nothing appears to the con-
“ trary, as in the case of indentures prece-
“ dent ; or when a recovery is suffered
“ without any consideration, and without li-
“ mitation of any use ; but as to the point of
“ pleading, it was resolved, that as well in
“ the case at bar, as in the case of an inden-
“ ture precedent and recovery suffered with-
“ out consideration, the usual form of pleading
“ ought not to be altered ; *sc.* to aver that the
“ recovery was suffered to such uses ; and,
“ upon the evidence, the court ought to direct
“ the jury according to law, or that they
“ should find the truth of the case, as in the
“ case at bar they do. And the justice in
“ this case cited a former resolution in the

“ point in the Court of Wards, between the
 “ same parties, Hil. 21 El., the whole special
 “ matter as before being found by office, and
 “ transcribed into the same court, where by
 “ Sir Christ. Wray and Sir James Dyer, as-
 “ sistants to the said court, and by the advice
 “ also of other justices, it was resolved, that
 “ the said indentures subsequent were suffi-
 “ cient to declare the uses of the recovery
 “ precedent, because nothing appeared to the
 “ contrary. And as to the fifth and last rea-
 “ son, or objection which was made, it was
 “ answered and resolved, that no mischief or
 “ inconveniency could ensue upon this con-
 “ struction as was pretended at the bar ; but
 “ great inconveniency would ensue on the
 “ other side, for the inheritances of many
 “ subjects in England depend upon such de-
 “ clarations subsequent, or at least upon in-
 “ dentures which in truth were delivered after
 “ the recoveries suffered, or fines levied. And
 “ these resolutions stand with the common
 “ opinion of men learned in the laws, and
 “ common experience ; and the alteration of
 “ such opinions which concern assurances of
 “ inheritances would be too dangerous.”

And in *Jones v. Morley* (b), Lord Holt, in
 observing on that case, says, “ It follows that
 “ this fine cannot be to the use of the deed of
 “ the 29th of January ; because the fine to be
 “ levied by the deed of the 29th, ought to

(b) 1 Lord Raym. 287.

“ have been levied the Hilary term *next following*, exclusive of that Hilary term in which the deed was made ; but this fine was levied the *same* Hilary term in which the deed was made ; and therefore there was a variance between the fine and the deed, and consequently room left for averment. For if there is room for averment, where a fine is levied of a time *after*, there is as much reason to admit it when a fine is levied of a time *before*. For in both cases the fine varies from the fine agreed to be levied by the deed. There is the same room for averment, where the declaration of uses is by deed subsequent to the levying of the fine. The only difference is, where the uses of a fine or recovery precedent are declared by a deed subsequent, the conusor and his heirs, or any claiming under him, are estopped to say that the fine was to the conusor and his heirs, &c. ; but a stranger shall not be estopped to show that. But in case of a fine varying from a precedent deed, no person is estopped to aver against the deed that the fine was to other uses. Then, in this case, since there is a variance between the fine and the deed, it is reason that the wife should avoid it. For if the deed had been pursued, she would have had twelve months to see whether the husband would perform the marriage agreement ; and if he would not, she might

“ have refused to join in levying the fine ;
“ of which benefit she was deprived by the
“ immediate levying of the fine. Then the
“ husband, by the writing of the 31st Ja-
“ nuary, agrees to give her the terms of her
“ marriage agreement. And accordingly the
“ fine was levied. From whence it appears
“ manifestly, that the agreement contained
“ in the deed of the 29th was relinquished,
“ and the new agreement was designed to
“ lead the uses of the fine.”

It has already been observed, that after the Statute of Frauds and Perjuries, a question arose whether there could be any subsequent declaration of the uses of a fine, or common recovery, and it was enacted by the statute of the 4 & 5 Ann. c. that a subsequent declaration *by deed* shall be good. This statute adopts the principle in *Downman's case*, already cited, except that it does not in terms require the deed to be *indented*. It is, however, by no means clear that the common law did not require the circumstance of indenting; on the contrary it seems to have required an indenture as the means of creating an estoppel; and if by the common law the deed must be indented, the statute does not alter the law in this particular; and it is prudent at least to have the declaration by deed indented.

The points to be collected from *Downman's case*, *Jones v. Morley*, and the statute law, are,
1st, That there may be a declaration of the

uses of a fine already levied, or a recovery already suffered.

2dly, That an *intermediate* conveyance will operate on the use which results in the mean time till the declaration, and govern the title so far as such conveyance extends, and of course preclude the right of defeating such conveyance by a subsequent declaration. The rule of law denies to men the right of derogating from their own acts (c).

3dly, That a declaration (d) cannot control either a declaration precedent to the fine or recovery, or contemporaneous with it; nor affect any estate conveyed by the owner, as owner. With these restrictions, a subsequent declaration of uses will be good, at whatever time it is made during the life, and the continuance of the ownership of the person by whom the fine is levied, or recovery suffered. Even the lapse of several years will be no impediment to the right to declare uses of the fine or recovery. When the uses are once fixed by a declaration precedent or subsequent, they cannot be varied or altered by a subsequent declaration, except so far as such new declaration may be in exercise of a power reserved for that purpose. While, as between several *declarations precedent*, attended with

(c) Brooke, Feoffment, pl. 1. 1 Ch. Cas. 100. *Brand's case*, Hob. 349. Sir Edw. Coke's *Ley*, 39.
 case, 6 Co. 57. *Batty v. Trevillion*, Moore, 280. Anders. 245. (d) Subsequent to the fine or recovery.

equal solemnities, the latter declaration will be effectual; as between several *declarations subsequent*, though attended with equal solemnities, the former of these declarations will govern the title.

Of declarations of uses in conveyances which pass an estate, to serve the uses, or which are ancillary to the assurance on which the uses are to arise.

When there is merely an executory agreement, and no conveyance, the party retains his ownership. The power of alienation remains in him, subject only to the agreement, as far as that agreement can operate.

After a conveyance has been made to uses, or to the intent that a common recovery shall be suffered, or a fine levied to uses, the seisin or ownership is changed; a new title is created, governed by this conveyance, and the former owner has no longer the power of varying the uses. It is a principle of law, that a man cannot derogate from his own act. Another rule more material to this point is, *quod meum est, sine facto sive defectu meo, amitti, vel in alium transferri non potest*; and of consequence, the interest acquired by third persons cannot be abridged or defeated without their concurrence.

Suppose tenant in tail to convey in fee to uses; this settlement is good against himself. It is voidable only, and not void,

as against his issue. It is in the option of the tenant in tail whether he will levy a fine or suffer a common recovery, to give confirmation to the title under this conveyance; but in case he levies a fine, or suffers a common recovery, he has no power, except so far as he may retain an estate or interest under the former conveyance, to direct the uses of such fine or recovery. By a necessary consequence of law, the fine or recovery will have the effect of giving confirmation to the former conveyance, even in opposition to the intention of the parties to the fine or recovery (e), as existing at the date of the fine or recovery.

The operation of a fine with proclamations will be to bar the issue, and render the conveyance indefeasible by them. A common recovery, if duly suffered, will have the more extensive operation of confirming the conveyance as against the issue in tail, and also against those in remainder or reversion expectant on the estate-tail, and all other persons who have any interest by way of condition or collateral limitation subordinate to the estate-tail (f). Nor is the rule confined to conveyances by tenants in tail; it is equally applicable to all estates, whether the convey-

(e) *Goodwright v. Mead*,
3 Burr. 1703. *Cheney v. Hall*,
Ambl. 526. *Stapilton v. Sta-*
pitton, 1 Atk. 2.

(f) See Chapter on Common
Recoveries, in Vol. 1.

ance is made by tenant for life, tenant in tail, or tenant in fee; notwithstanding the decided cases have for the most part arisen on conveyances by tenants in tail. And the rule equally extends to give confirmation to particular interests, as leases, grants for life, rent-charges, and the like, when they are prior to the fine or recovery: and the recovery is duly suffered. In cases of this sort the right is bound by the conveyance; an interest is acquired; and, in application to these particular instances, it is perfectly correct, that the use cannot be altered or varied, even while it is executory, without the consent of all persons, concerned in interest. With their consent, in an instrument equally solemn with the instrument by which the uses were originally created, no doubt can be entertained of the right to alter or vary the former uses, and to add or substitute other uses. This necessarily flows from the principle, that *unum quodque dissolvi potest, eodem ligamine quo ligatum est*. This distinction, however, must be kept in mind, that when there is a conveyance to uses, so that the uses are immediately executed by the statute, it is no longer competent to the parties to vary the title merely by an agreement or declaration of uses. There must be a *new conveyance*, or there must be a bargain and sale, or covenant to stand seised, creating uses to arise from the seisin of the person, who

under the former uses takes a vested estate. For example: when *A.* conveys to *B.* in fee, to the use of *B.* or *C.* for life, with remainder to *D.* in tail or in fee, each *cestui que use* has immediately a vested estate, and no change can be made in his ownership by an attempt to declare other uses, even with his consent. An estate of freehold once vested cannot be defeazanced or avoided by an executory agreement. There must either be a surrender or conveyance of particular estates, or a new conveyance, bargain and sale, or covenant to stand seised of other estates. This is equally true, although there may be in the conveyance a covenant to levy a fine or suffer a common recovery, with a declaration that the same shall enure to the uses limited by the conveyance. Notwithstanding such covenant or agreement, the conveyance has performed its office of raising the uses, and, by force of the conveyance, they become actual estates. The operation of such conveyances is not suspended, so as to give executory interests by reason of the subsequent covenant, agreement, or declaration. But when a conveyance is made to *A.* and his heirs, to the intent that a common recovery shall be suffered, or fine shall be levied, with a declaration that this recovery when suffered, or fine when levied, shall enure to certain uses; these uses will in the mean time,

till the recovery is suffered, or the fine is levied, remain in an executory state, and while the uses are executory, they may be defeazanced, altered, or varied (g), by the agreement of all persons concerned in interest: and by the persons concerned in interest must, it is apprehended, be understood the persons who are to be benefited by the uses, and not the conusee, demandant or tenant, merely as such. These observations will show the full force of the distinctions which prevailed in *Goddard v. Complin* (h), *Stapilton v. Stapilton* (i), *Moody v. Moody* (j), *Cheney v. Hall* (k), and *Goodright v. Meade* (l). As these cases involve a large portion of useful learning, they will be stated, as far as they are material to the points now under consideration.

In *Goddard v. Complin*, "Tenant in tail
 " mortgaged for years, and afterwards upon
 " marriage, in consideration thereof, suffered
 " a recovery to settle a jointure; and the
 " question was, whether this recovery should
 " enure to make good the mortgage, *it being*
 " *designed for the marriage settlement only?*
 " And it was answered, if no recovery had
 " been, there could have been no jointure,
 " and the jointress could not have avoided

(g) *Andrews' case*, Moore,
 107. pl. 349.

(h) 1 Ch. Cas. 119.

(i) 1 Atk. 2.

(j) Ambl. 649.

(k) Ambl. 526.

(l) 3 Burr. 1703.

“ the mortgage ; and she is in’ by the act of
“ her husband, and no subsequent act of the
“ husband could avoid his own act precedent.
“ And it was also declared, that if tenant in
“ tail confess a judgment, &c. and suffer a
“ recovery to any collateral purpose, that
“ recovery shall enure to make good all his
“ precedent acts and incumbrances.”

In *Stapilton v. Stapilton*, “ By a deed
“ dated on the 21st of August, 1661, Philip
“ Stapilton, who was tenant of the premises
“ in question for 99 years, if he should so long
“ live, remainder to trustees for life, (it must
“ be understood to preserve contingent re-
“ mainders,) remainder to his first and other
“ sons in tail male, remainder to his right heirs.
“ And having two sons, Henry and Philip,
“ *they*, by deeds of lease and release, the 9th
“ and 10th of September, 1724, reciting that
“ for settling and perpetuating all manors,
“ &c. in the name and blood of the Stapiltons,
“ and for making provision for his two sons,
“ &c. for preventing disputes and controver-
“ sies that might possibly arise between the
“ said two sons, or any other person claiming
“ an interest in all or any of the estates there-
“ inafter mentioned, and for barring all es-
“ tates-tail, and for answering all and every
“ the purpose and purposes of the parties
“ thereto, and for and in consideration of the
“ sum of 5 s. release and confirm to *Thompson*
“ and *Fairfax* all those manors, &c. to

“ have and to hold to them, their heirs and
“ assigns, to the use (as to part) of Philip the
“ father, his heirs and assigns for ever, and
“ as to another part, to the use of Philip the
“ father, for life, remainder to Henry the son
“ for life, remainder to trustees to preserve
“ contingent remainders, remainder to his
“ first and every other son in tail male,
“ remainder to Philip the son for life, re-
“ mainder to trustees to preserve contin-
“ gent remainders, remainder to his first and
“ other sons in tail male, remainder to the
“ daughters of Henry in tail, remainder to
“ the daughters of Philip the son in tail,
“ remainder to the right heirs of Philip the
“ father; and as to the remaining part, to
“ the use of Philip the father for life, with like
“ limitations in the first place to Philip the
“ son and his issue, and then to Henry and
“ his issue, remainder in fee to the father.”

“ There were covenants to suffer a recovery
“ within 12 months, and likewise for further
“ assurances. To this deed, the heir of the
“ surviving trustee in the deed in 1661 was
“ not a party. But by deeds of lease and re-
“ lease, dated the 28th and 29th of Septem-
“ ber, 1724, to which the heir of the surviving
“ trustee of the deed of 1661, was a party,
“ the father and two sons make Thompson
“ and Fairfax tenants to the *præcipe*, in order
“ to suffer a recovery for the purposes men-
“ tioned in the former deeds of the 9th and
“ 10th of September.

“ Before any recovery suffered, Henry
“ died, leaving issue the plaintiff.

“ Afterwards, by lease and release, the
“ 12th and 13th of April 1725, to which the
“ heir of the surviving trustee of the deed of
“ 1661 was a party, Philip the father and
“ Philip the son covenant to suffer a reco-
“ very, in which Thompson and Fairfax were
“ to be tenants to the *præcipe*, to the use, as
“ to part, of Philip the father, his heirs and
“ assigns, and as to the other part, to the use
“ of Philip the father for life, remainder to
“ Philip the son in fee.

“ In Trinity term 1725, a recovery was
“ suffered, in which were the same tenants to
“ the *præcipe*, the same demandant, and the
“ same vouchees (except Henry, who was
“ dead) as were covenanted to be by the first
“ deed ; it was likewise suffered within twelve
“ months after the first deed.

“ The father, Philip Stapilton, being dead,
“ the plaintiff, as son and heir of Henry,
“ brought his bill to establish his title to the
“ premises in question, and for the whole
“ estate as tenant in tail, under the old set-
“ tlement, and to be let into possession, and
“ for an account of rents received by Philip
“ Stapilton the son, due since the death of
“ the plaintiff's grandfather, and to have
“ the same applied for the plaintiff's benefit
“ during his infancy, and for an injunction
“ to restrain the defendants from receiving
“ any more rents.

“ The defendant Philip, the son, by his
“ answer, confesses the several deeds before
“ mentioned, but says, Henry was a bastard ;
“ and that by virtue of the deed of 1725, and
“ of the recovery, he was entitled to the
“ whole estate in question.

“ Upon an issue, directed, Henry was
“ found illegitimate, and the cause was now
“ heard upon the equity reserved, when the
“ counsel for the plaintiff waving the claim
“ to the whole estate insisted as one point,

“ That the recovery suffered in Trinity
“ term 1725, should enure to the use of the
“ deeds of the 9th and 10th Sept. 1724, and
“ not to the uses of the deed in 1725.

“ It was said that the uses when once de-
“ clared cannot be altered, unless all the par-
“ ties entitled to the uses join in the new
“ declaration, and Henry did not join in the
“ deed of 1725.

“ For the defendant, it was argued, that
“ Henry being dead before the recovery was
“ suffered, the intent of the parties, in the
“ first deed, could not be pursued ; for the
“ plaintiff (supposing him legitimate) claims
“ paramount his father, and the deed of 1661 ;
“ therefore as the recovery could not sub-
“ stantiate the first deed, supposing him legi-
“ timate, it shall not substantiate it now he is
“ found illegitimate.

“ The plaintiff upon the death of his father
“ had not any use vested in him, for the intent
“ of the parties was, that the uses should

“ arise out of the recovery ; the ends recited
“ could not be come at without a recovery,
“ and where the intent of the parties is that
“ the uses should pass by fine or recovery,
“ nothing will pass by the deed that is in-
“ tended only to declare the uses ; the fine
“ and recovery all make but one conveyance,
“ Cro. Jac. 643. 2 Ro. Rep. 68. 2 Lev. 306.
“ 1 Vent. 279. 2 Lev. 54. Cromwell’s Case,
“ 2 Co. 69. b.

“ Lord Chancellor.—The plaintiff in this
“ case is entitled to have a decree ;—

“ Upon this case there are, his Lordship
“ observed, two general questions ;

“ 1st. Whether the plaintiff had any estate
“ in law by virtue of any of the conveyances,
“ or by the recovery ? 2dly. If he had no es-
“ tate at law, or only a defeasible one, whe-
“ ther he was entitled to have the benefit of
“ this agreement, and to have it carried into
“ execution here ?

“ The first question consists of two
“ branches :

“ 1st. Whether the lease and release of the
“ 9th and 10th of Sept. 1724, will amount to
“ a good declaration of the uses of the reco-
“ very, notwithstanding the subsequent deed
“ of April, 1725 ?

“ 2dly. If not, whether the recovery of
“ Trinity term, 1725, having barred the estate-
“ tail, will make good any estate which passed
“ by the lease and release of the 9th and
“ 10th of September, 1724 ?

“ As to the first ; whether the lease and
 “ release is a good declaration of the uses of
 “ the recovery ? I am strongly inclined to
 “ think it will amount to a good declaration :
 “ this question depends on the construction
 “ of law, and the authority of cases upon the
 “ declaration of uses. It is true, where there
 “ is an agreement to suffer a recovery, and
 “ uses are declared, if the recovery is after
 “ suffered, though it varies in point of time
 “ from the recovery covenanted to be suffered,
 “ yet if there is no subsequent declaration of
 “ uses, the recovery will enure to the uses so
 “ declared. And before the statute of frauds,
 “ if the deeds declaring the uses had not
 “ been pursued, a parol declaration of uses
 “ would have been let in ; but if there is a
 “ deed declaring the uses, and the common
 “ recovery is suffered accordingly, that would,
 “ before the statute, exclude a parol declara-
 “ tion of new uses.

“ But even now there may be a subse-
 “ quent declaration of uses, but that decla-
 “ ration must be *in writing* (*m*), and such a
 “ new declaration of uses depends upon the
 “ agreement of the parties ; therefore, though
 “ it is said at the bar, that the declaration
 “ of uses is in the power of the tenant in
 “ tail, and that he may declare new uses, I
 “ take that not to be law ; for such subsequent

(*m*) It must be by *deed* ; and query if such deed must not be
indented ?

“ declaration must be by all the parties concerned in interest; and in the case of the Countess of Rutland, 5 Co. 25, it is not laid down there that the tenant in tail might declare new uses, but said, whilst it is *directory* only, new uses may be declared; and the meaning of that is, that as the uses must arise out of the agreement of the parties, the parties may change the uses, but that must be done by the mutual consent of all the parties concerned in interest, and in that case it was a mutual agreement of all parties.

“ And in the case of *Jones v. Morley* (n), 2 Salk. 677, there was a variance as to the time of suffering the recovery, from the deed declaring the uses, and there held that a declaration of uses was equally good, whether by deed or not, if in writing.

“ But in the present case, the second agreement not being between all the parties concerned in interest ought not to control the first declaration, and especially as this recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant.

“ The consideration for suffering the recovery was good both in law and equity, and there is no case to warrant me to say the first agreement is not good and binding, or that the tenant in tail could by his own agreement afterwards change the uses.

(n) Before the statute of 4 & 5 Ann.

“ But if it was doubtful whether the recovery suffered in 1725 should enure to the uses declared by the deed of 1724, I am of opinion the recovery will operate to make good those estates which passed by the deed of 1724.

“ But to this two objections have been made. 1st. That the uses must be governed by, and operate according to, the intention of the parties ; therefore the subsequent recovery being suffered to other uses, those uses will take place. 2dly. If any uses did pass by the deed in 1724, yet this recovery will not make those uses good, because the subsequent recovery was suffered to particular uses declared by the deed of 1725.

“ As to the first objection, I am of opinion that a use did pass by the deed of 1724, and according to the intention of the parties. It is certainly true, that, according to the statute of uses, the general doctrine is, that the uses shall be executed according to the intention of the parties ; but both the courts of law and equity consider what was the general and final intent of the parties. In this case their intention was that the estate should pass, and wherever a court of law or equity find that the general and substantial intent of the parties was that the estate should pass,

“ they will construe deeds in support of that
“ intention, different from the formal nature
“ of those deeds themselves ; as a feoffment,
“ to serve the intention of the parties, shall
“ operate as a covenant to stand seised. The
“ intent here was, that the estate, in point
“ of law, should pass by the deed of 1724,
“ and that the uses declared by that deed
“ should vest in the mean time till the reco-
“ very suffered.

“ This is an answer to the objection arising
“ from the statute of uses ; but there is an-
“ other question, what estate passed by the
“ deed of 1724 ?

“ It was a defeasible estate, to serve the
“ uses of that deed ; and so in the resolution
“ in *Machel v. Clarke*, in Farr. 18 Salk. 619.
“ That tenant in tail may convey a base fee,
“ and estate defeasible by the entry of the
“ issue.

“ The next question is, whether the reco-
“ very suffered in 1725 did enure to make
“ good and render indefeasible those base
“ estates created by the deed of 1724 ?

“ And I am of opinion they are made
“ good. The objection to this is, that the
“ recovery was suffered in pursuance of the
“ deed in 1725, wherein there were new
“ uses limited ; but the only uses which make
“ any difference in that deed are to Philip
“ the son, and his heirs, so there is no body

“ concerned in the question but Philip and
“ his heirs.

“ It has been argued by defendant’s coun-
“ sel that, if the first declaration of uses is
“ in general to prevail, purchasers of estates,
“ though they have a recovery for strength-
“ ening their title, with a declaration of the
“ uses of the recovery to themselves and
“ their heirs, cannot be safe, for the vendor
“ may defeat such declaration by a prece-
“ dent one, to different uses; but in such
“ cases I think a recovery would not enure
“ to make good such former declaration of
“ uses, but only the uses of the purchase.

“ It is admitted, that if tenant in tail con-
“ fesses a judgment, or a statute, or enters
“ into a bond, and afterwards suffers a re-
“ covery to bar the estate-tail, it lets in the
“ precedent judgment, &c. And it is as
“ clear, if a tenant in tail makes a lease not
“ warranted by the statute of the 32 Hen. 8.
“ if he suffers a recovery, that lets in the
“ lease and makes it good.

“ There are so many cases of this kind,
“ that it is not necessary for me to mention
“ them.

“ This case is *different from those that turn*
“ *only upon the point of the effect of a mere*
“ *declaration of uses*; for a mere declaration
“ of uses subsists only upon the agreement
“ of the parties, and in such cases, where
“ the agreement has been changed by mu-

“ tual assent of all parties, there a recovery
“ shall enure to make good such last agree-
“ ment or declaration.

“ But if the *estate was vested*, notwithstand-
“ ing such declaration of uses, yet the reco-
“ very has always been held to make good
“ such defeasible estate ; for the prior lease,
“ charge, or estate made by tenant in tail, is
“ only defeasible by the issue, by virtue of
“ the statute *de donis*, which was made to
“ protect the issue against the alienation of
“ the tenant in tail, therefore the issue would
“ avoid such lease, &c. but not the tenant in
“ tail himself ; but when, by the recovery,
“ he has gained to himself a fee, all the rea-
“ soning for avoiding an estate made by
“ tenant in tail is gone, for the issue is barred
“ by the recovery. The reason why the
“ issue may avoid a charge made by tenant
“ in tail, is upon account of the protec-
“ tion of the issue, and his estate, under the
“ statute *de donis*, and of the privity of
“ the estate-tail ; but when the privity is
“ gone the reason ceases ; and to this pur-
“ pose is the case of *Croker v. Kelsey*, Sir
“ W. Jones, 60.

“ In the case of *Lord Derwentwater*, Mod.
“ Cases in Law and Equity, 172, 2d part, the
“ question was, whether a papist, tenant in
“ tail, suffering a recovery, and declaring the
“ uses to himself in fee, gained a new estate
“ within the 11th and 12th of Will. 3. or was

“ in of the old use? And it was held, the 5th
 “ of Geo. I. by four judges out of five, appoint-
 “ ed delegates to determine appeals from the
 “ commissioners of forfeited estates, that he
 “ was in of the old use; and I take it for law,
 “ that a tenant in tail suffering a recovery is
 “ in of the old use, and that the estate is dis-
 “ charged of the statute *de donis*; and there-
 “ fore I am of opinion that the recovery has
 “ made good this defeasible estate created
 “ by the deed of 1724.

“ It has been objected, that if the plaintiff
 “ has any title his remedy is at law; but
 “ I think it is more properly here; he is an
 “ infant, and has come recently into this
 “ court, nor do I think this case depends
 “ entirely upon the point of law; for I am of
 “ opinion that the plaintiff is entitled to have
 “ an execution of the agreement, as a good
 “ and binding agreement in this court.”

In *Moody v. Moody* (o), Edward Moody was tenant in tail, under his father's will, with a contingent remainder in fee to himself, and being about to marry, in 1709, he conveyed (by way of immediate use) to the use of himself and his intended wife, for their lives, with remainder to the heirs of their bodies, remainder to himself and his wife in fee.

Edward Moody afterwards made his will, and devised part of the estate, of which he

(o) Ambl. 649.

had suffered a recovery, to his younger son, after the death of his wife.

The wife died, and the eldest son set up a title to the estate.

The bill was brought by the younger son, and Lord Camden, Chancellor, gave his opinion: 1st. "That the recovery was a confirmation of the settlement, and not a destruction of it; considered as a bar of the old entail only."

In *Cheney v. Hall* (p), Gerard Walker, the father, by settlement on his marriage in 1706, conveyed an estate in Derbyshire to the use of himself for life; remainder as to part to his wife for life, by way of jointure, remainder, as to the whole, to the first and other sons of the marriage. There was issue of the marriage Gerard Walker, the eldest son, and other children.

In 1733, the son on his marriage conveyed part of the estate, by lease and release; to the use of himself for life; remainder to his intended wife for life; remainder to the heirs of the body of the wife; remainder to his own right heirs.

In 1746, the father and son mortgaged the premises to Henry Peach for 1000 years, to secure 300*l.* and suffered a common recovery, and declared the uses to the mortgagee, and then to the father for life, with the remainder to the son in fee.

In 1749, Henry Peach purchased the son's reversion for a valuable consideration, and took a conveyance to himself in fee.

Afterwards Walker the son died in 1751, leaving a widow, and the defendant, Gerard Walker, the eldest son of the marriage, and several other children.

Afterwards Walker the father died in 1756. The widow of the father was still alive.

The question was, whether the common recovery in 1746 should enure to the uses of the settlement of 1733?

Lord Chancellor was clear of opinion, that the common recovery enured to the uses of the settlement of 1733. "In this case," he observed, "there is a conveyance and a transmutation of possession, and the remainders are not void."

In *Goodright v. Mead* (q), John Shilson, the father of the defendant Nicholas Shilson, being seised to him and the heirs male of his body of the premises in question, the remainder to his own right heirs, by lease and release, dated 24th and 25th October 1742, previous to his marriage with Susannah Smerdon, conveyed the same to trustees, to the use of himself for life; remainder to the trustees to preserve contingent remainders; remainder to the use of the said Susannah,

for her life ; remainder to his first and other sons by the said Susannah in tail male.

The marriage took effect, and they had issue Nicholas Shilson, the defendant, their only son.

In Trinity Term 1761, the said John Shilson suffered a common recovery ; and by deed dated 24th June, 1761, he declared the uses of the said recovery to be to — Lucas, his heirs and assigns, in trust to sell the said premises, &c.

The said — Lucas, by lease and release, dated 27th and 28th October, 1763, in pursuance of the trusts of the said deed last mentioned, conveyed the said premises to Elizabeth Tyrrell, the lessor of the plaintiff, and her heirs.

The said John and Susannah Shilson are both dead.

The question is, whether, upon the facts stated, the plaintiff is entitled to recover the said premises.

And by Mr. Justice Wilmot, “ it is now
“ fully settled, ‘ That a release or bargain
“ and sale by a tenant in tail will convey
“ a base fee ; a defeasible estate ; to the
“ releasee or bargainee :’ though it must be
“ allowed, that the old notion was, and even
“ in Lord Coke’s time, that a tenant in tail
“ could not convey an estate longer than
“ for his own life. But that notion is now
“ overruled ; and the contrary settled.”

Lord Mansfield observed, "It is now settled, that a release, or bargain and sale by a tenant in tail, gives a base fee, voidable by the issue in tail. This is the principle of *Machel v. Clarke*, and many subsequent cases have been grounded upon it; particularly that of *Stapilton v. Stapilton*.

"Besides, the common recovery has made good this defeasible estate.

"Either ground makes an end of this question. The recovery takes off the fetters of the statute *de donis*."

Mr. Justice Wilmot concurred. He said "the tenant in tail had a fee originally; and a common recovery leaves him a fee again, by removing the bar and fetters imposed by the statute. When the bar and fetters are removed, it then becomes just the same case as if he had been tenant in fee simple *ab initio*. And though formerly it was doubted, whether a tenant in tail could, any otherwise than by a feoffment, grant any thing more than for his own life, yet it is now settled, by the case of *Machel v. Clarke*, that he may, by bargain and sale, or by lease and release, pass a base fee; and if so, it is in his power to limit the remainder as he pleases. And it makes no difference whether it is limited to the use of the bargainee, or the releasee, or to a stranger, or to himself for life, with

“remainders over; for the base fee feeds all the uses that are limited upon it; till avoided by the entry of the issue in tail.”

And Mr. Justice Yates added, “a lease and release, or a bargain and sale by the tenant in tail, is not absolutely void; but conveys a base fee, defeasible by the entry of the issue in tail. This is now settled by the case of *Machel v. Clarke*: and many determinations and conveyances are founded upon it.”

Mr. Justice Aston concurred: the Court were therefore unanimously of opinion, that the recovery enured to the uses of the settlement, and that the plaintiff had no title.

When no uses are declared the use will result to the former owners, according to their former ownership, viz. to joint tenants, as joint tenants; to tenants for life, as tenants for life; to tenants in fee, as tenants in fee (*r*): but the use which results to a tenant in tail will be an use of the estate, which he conveys to the conusee in the fine, viz. a fee simple when a discontinuance is created, and when no discontinuance is created, then a base or determinable fee, commensurate with the ownership of the estate-tail (*s*).—An estate

(*r*) *Argol v. Cheney*, Latch. 82. 369. *Moxon v. Moxon*, in the
Roe v. Popham, Douglass, 25. Exch. 1777. *Hodges v. Fowler*,
 (*s*) *Waker v. Snow*, Palm. Exch.

tail will never be taken by way of resulting use, on a fine levied, or any other conveyance made by tenant in tail. All the cases from which it has been collected that the use resulting on a fine, by tenant in tail, will give an estate-tail, are now understood to apply only to the degree of ownership, and not to the quality of the estate, as descendible to the issue in tail.

But the use will result in those cases only in which, from the absence of declared intention, and also of consideration, there is no reason to give the use to the conusee. Whenever the intention, or a consideration requires it, the legal estate will remain in the conusee, and not be affected by any resulting use; so that the conusee may have the benefit of the fine without any express declaration of use in his favour. In *Altham v. Anglesea* (t), a fine was levied, and after an interval of several years a common recovery was suffered, in which the conusee was named tenant, and from this circumstance alone it was inferred that the legal estate was to remain in the conusee, so as to make him tenant: and the presumption of a resulting use was rebutted. The like point was determined in *Thrustout v. Peake* (u). In the latter

(t) *Nightingale v. Ferrers*, 3 P. W. 207. Gilb. Eq. Cas. p. 16. (u) *Strange*, p. 16. Salk. 676.

case the language of the *Chief Justice* was, “ the fine being levied, and no use declared, “ the recovery being immediately suffered “ of the same lands, and the writ of entry “ brought against the conusee in the fine, “ shows that the intent of levying the fine “ was to make a tenant to the *præcipe*.”

Also in *Roe v. Popham* (x), the language of *Lord Mansfield* was, “ The case cited by Mr. “ Morris, *Altham v. Anglesea*, is good law. “ There there was evidence to rebut the “ resulting use ; but here I see no proof of “ intention on the part of the reversioner “ in fee. He was not a party to the marriage articles. If he had been, that would “ have been strong evidence against any resulting use to him. The form of a fine is “ to give a title to the conusee ; but in truth “ it is for the convenience of the conusor ; “ and, from the constant usage, the presumption is that it is levied to his use. “ This indeed is liable, like all other presumptions, to be encountered by contrary “ evidence ; but here the reversioner in fee “ has done nothing to rebut the presumption.” Titles depending on resulting uses on the one hand, and an implied use in the conusee on the other hand, are viewed with great suspicion, from an apprehension that there may have been a consideration to re-

(x) Doug. p. 24.

but the resulting use, or there may be the want of a consideration to complete the title of the conusee. To meet these difficulties it is prudent to have a deed to lead, or else a deed to declare, the uses of the fine. In deeds to lead the uses of fines the execution of the deed by the conusee is not deemed of essential importance. Nor is it deemed of great importance in declarations of uses, when the declaration is nearly contemporaneous with the fine, and there is no change in the possession. But as often as there is some, and merely a short, interval between the fine and the declaration of uses, the concurrence of the conusee is required. And in all cases it is proper, by way of obviating the difficulties of future purchasers, that the deed to lead, and also the deed to declare, the uses of a fine, should be executed by the conusee as well as by the conusor. It often happens that the deed has not been executed by the conusee, and that on account of the death of the conusee, or from other causes, the execution of the deed by him is impracticable. Under these circumstances the conveyancer is led to consider, whether, from the nature of the transaction, the continuance or the change of possession, or from other facts with which the title is attended, there is any occasion for particular caution, and to treat the title as doubtful. In general, the conusee in the fine is merely named for form, and has no

interest : and unless he has had the possession, or been in the receipt of the rents, or there is reason to suspect that he was a mortgagee, or entitled in some other manner, the title may be safely accepted without pressing for any declaration by those who alone can obviate the difficulty.—The only mode of investigating the fact, whether there is any interest derivable under the fine, from or through the conusee as a beneficial owner, is to make the inquiry of the conusee, if living, and if dead, of his heir, and also of his personal representative. This, in general, is the utmost extent to which an inquiry can be directed : but particular cases, as the assertion or rumour of a claim, will direct the inquiry to the channel through which it is likely that information may be obtained.

It is also to be added, that in conveyances, either to uses, or to the intent that a fine may be levied, or a recovery suffered to uses, the execution of the deed of uses by the conusee in the fine, or by the tenant in the recovery, is deemed of less importance, and immaterial, except by those whose practice is particularly cautious ; for whoever receives the estate must receive it upon those terms alone on which it is conveyed ; and the conveyance itself contains all the information that can be reasonably required concerning the uses. They however who expect that

even in these cases the deed shall be executed by the conusee in the fine, or by the tenant in the recovery, justify their practice by contending that this is the only evidence by which they can be satisfied that a fine was levied, or recovery suffered to these uses. Similar cautions would render the transaction of business more difficult than it is already found, and there is already a complaint against the unnecessary difficulties imposed by that which is termed cautious practice. At the same time experience justifies the observation, that most of the cautions observed by conveyancers are the result of experience, and warranted by the difficulties with which the transactions relating to the transfer of property are surrounded. The history of a professional life devoted to the investigation of titles would prove that the utmost ingenuity, caution, or industry, is not equal to guard against all the dangers to which the change of property is exposed, sometimes from the fraud, and at other times from the ignorance of the former proprietors: and every purchaser expects extreme caution to be observed in his particular case, that he may not be the victim of such fraud or ignorance.

Agreements to lead and to declare the uses of fines are generally found in instruments which have other objects. In most instances they are merely an addition to a

conveyance contained in a former part of the instrument, and there is merely a covenant to levy a fine, with a declaration that the same shall enure to the uses previously declared ; or a recital that a fine has been levied, and that no uses have been declared of the fine, or that no uses have been declared of those particular lands which are the subject of the deed ; and then the deed proceeds to declare uses of the fine, according to the intention of the parties, either by a full and express declaration of the uses, as the plan of the instrument requires, or by a reference to the uses previously declared. Of course, in instruments of this description, the other objects of the deed must, in a great measure, govern its form, and direct the number of parties ; but a simple deed to lead or declare the uses of a fine has the following parts :

- 1st, The denomination or style of the deed ;
- 2d, The date ;
- 3d, The names of the parties ;
- 4th, The recitals ;
- 5th, The testatum clause ;
- 6th, The agreements to levy the fine or the recovery ;
- 7th, The uses which are declared.

Under each of these heads may be introduced those observations which govern the general practice in preparing deeds to lead, and deeds to declare the uses of fines ;

and very little attention will enable the reader to apply these observations to deeds of a more complex nature, which ought to contain an agreement to lead or to declare the uses of a fine, with or without a covenant that a fine shall be levied. In the progress of these observations it will be found that the practice is directed to obviate all objections arising from the cases which have been introduced, for the purpose of showing those resolutions more immediately applicable to the learning on this subject.

1st. *The Denomination or Style of the Deed.* In general the uses of fines are directed by *indenture*, but they may be directed by *deed-poll*. In short, they may be limited by mere writing, except that declarations of the uses of fines already levied must, in consequence of the provisions of the 4th and 5th of Anne, be by *deed*. It is also to be observed that *Downman's case* required the deed to be *indented*. Also, when there is to be a variation of uses, as expressed in a former instrument, there must either be a change in the circumstances under which the fine was agreed to be levied, or the second declaration must be by an instrument equally solemn with the instrument containing the former agreement. From the cited cases, particularly from the *Countess of Rutland's case*, &c. it may be collected, that when there is a variation in

the mode of levying a fine, the second agreement will govern the uses, although the former agreement was by deed, while the latter agreement was by mere writing without deed.

It is also to be observed, that for all the purposes of this question a deed-poll and indenture are equally solemn; but an agreement under hand, or under hand and seal, and not delivered, is not equally solemn with an instrument attended with the ceremonies of sealing and delivery. The latter is a deed; the former is merely an instrument in writing under seal.

2dly. *Of the Date.*—Deeds to lead the uses of fines are, from their nature, dated and executed before the fine is levied; while deeds to declare the uses of fines already levied suppose the fine to be levied, and of course are subsequent in date. But it often happens that a covenant is entered into to levy a fine as of a preceding term, so that the fine is by legal relation anterior to the date of the deed, and yet deeds of this description are considered as deeds to lead the uses of fines. Sometimes also a fine is recited as acknowledged and intended to be levied, as of a subsequent term, and uses declared of this fine are also to be deemed as uses *directory*, and not as uses declaratory. That alone is properly a declaration subsequent which is grounded on a perfect

fine, so that the uses will arise, and be executed the moment the deed has received its perfection. The date is also material in cases like that of *Jones* and *Morley*, as the means of ascertaining the time within which a fine is to be levied, so as to be brought within the influence of the agreement by which the uses are declared.

3dly, *Of the Parties*.—The proper parties to declare the uses of a fine are the conusors on the one part, and the conusees on the other part; but when several conusors have different shares, as joint-tenants, tenants in common, and coparceners, or different interests, as for life and in fee, they are generally arranged as parties of different parts: as *A. B.* of the first part, *C. D.* of the second part, and so on; and all persons who are interested in the assurance to be made by the declaration, should be consenting parties, and of course should be named among the parties, so as to give their consent in the operative part of the deed. As for instance; when a married woman is a trustee or mortgagee, and a fine is to be levied by her and her husband to make an effectual conveyance of her estate, the *cestui que trust* should be a party to join in the declaration of the uses, and of course the number of parties will vary with the circumstances. *Beckwith's*

case (y), with the power of a husband to declare the uses of a fine by him and his wife, is noticed in the former volume (z). It has also been noticed, that those persons who have aliquot parts cannot declare the uses of more than their particular parts; nor can persons who have partial interests declare the uses for any period beyond their own ownership; so that a declaration by the owner of one share, or one estate, will not bind the owner of another share, or of another estate (a).

4thly, *Of the Recitals.*—The recitals should, for the most part, show the state of the title, and the object of levying the fine. When a fine is levied by husband and wife, the presumption of law, till the contrary is shown, is, that the husband and wife are seised in right of the wife; and as often as the husband is the owner in his own right, this fact should be disclosed by the recitals, or inserted as part of the description of the parcels. This is not essential with a view to the operation of the assurance; but it may materially assist the future investigation of the title. Also, when

(y) 2 Co. p. 57.

(z) Ib. p. 314.

(a) *Nightingale v. Ferrers*,

3 P. W. 207. *Rowe v. Popham*,
Doug. 24.

a fine is levied, as is very common, for barring estates-tail, &c. the commencement of the estate-tail should be disclosed, accompanied with such other recitals as will lead to the information that the fine is a competent assurance for attaining the object intended to be accomplished. No objection is more common than one arising on a fine levied for barring estates-tail, and at the same time conveying the fee-simple. The ground is, that it does not appear that the fine was effectual for this purpose; and the objection takes its rise from an apprehension that there may have been remainders or reversions, which could not be barred by means of a fine. The better opinion seems to be, that the purchaser cannot sustain this objection unless he can actually prove, or at least raise the inference, that there were reversions or remainders outstanding in other persons than the parties to the fine. Even in cases in which the party had an estate-tail, with the immediate reversion in fee by descent, and he levied a fine with proclamations, instead of suffering a common recovery, it was a very common objection that there might have been incumbrances affecting the reversion, and that the title could not be safely accepted until a common recovery had been suffered, so as to bar the reversion, and consequently all incumbrances affecting that estate. This objection is no

longer tenable. It is decided by *Sperling v. Trevor*, 7 Ves. Jun. 497, that even under these circumstances the title will be deemed good without a common recovery, unless the purchaser can show that there are incumbrances affecting the reversion, and not reached by the operation of the fine. As often as the object of the deed is to declare the uses of a fine already levied, there should be a recital of the fine, with a further recital that no uses have been declared of the fine; or, as the case requires, that no uses have been declared of the fine, as far as the same relates to or concerns the lands of which uses are to be declared.

5thly. *The Testatum Clause.*—The general objects of the deed are stated in this clause, and each testatum clause varies with the circumstances by which it is dictated. Sometimes the clause runs in this form:—"For barring, docking, and destroying all estates-tail, &c. and for settling and assuring the messuages, &c. to the uses, &c. hereinafter limited and declared of and concerning the same." In other instances the references are still more general; as, "for settling and assuring the messuages, &c. to the uses hereinafter declared concerning the same;" or when the recitals fully state the object, and the agreement to levy the fine, the testatum clause will be to this

effect:—"In pursuance and performance of
"the hereinbefore recited agreement, and
"for carrying the same into effect." The
precedents in the Appendix will afford ex-
amples of these clauses. The general rule
to be observed is to express every thing that
may elucidate the title, and assist in the
future investigation of it; and carefully to
avoid all reference to any fact which may
show a defect in the title, or raise a difficulty
concerning it on any future occasion. No
reference should be made to estates-tail,
except there are estates of that description.
It was formerly a very general practice, to
convey by fine and declaration of the uses. In
modern practice a lease and release are
added. It is very probable, however, that
the heavy stamp-duties will render it con-
venient, especially in small purchases, to re-
sort to the old practice; and settlements as
well as purchases may be accomplished
merely by means of the fine and declaration
of uses, without the addition or intervention
of a conveyance by lease and release, or any
other grant. The fine, when an actual con-
veyance, produces every effect which can
be produced, even with the addition of a
lease and release, and the fine operates as a
conveyance as often as the conusor has a
seisin in possession, reversion, or remainder.
In this clause also the consideration is to be

expressed ; and when it is expressed, the directions given in the chapter of Releases ought to be observed. At the same time it is to be noticed, that an actual or a nominal consideration is not an essential part of this assurance. In reference to the rules of the common law, the will of the party is sufficient to raise or direct the uses as against him or his heirs. A consideration, however, may be material to support the deed against creditors and subsequent purchasers, or against creditors claiming under a commission of bankrupt. When a consideration is paid, the receipt should be acknowledged in like manner as in other deeds made for a valuable consideration. In deeds to lead the uses of fines there is generally a covenant to levy the fine. It is generally in this form :

And the said _____, for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said _____ his heirs and assigns, in manner following (that is to say) That _____ shall and will, at the proper costs and charges of the said _____, in or as of _____ term now last past, or before the end of _____ term now next ensuing, acknowledge and levy unto the said _____ and his heirs, before his majesty's justices of the court of Common Pleas at Westminster, one

or more fine or fines, *sur conuzance de droit come ceo*, &c. with proclamations to be thereupon had and made according to the form of the statutes in that case made and provided, and the usual course of fines in such cases used of the said hereby released or otherwise assured, or intended so to be, with the appurtenances [*or*, ALL that, &c.] by the names and descriptions of

[or by such other apt and convenient names, number of messuages, and acres, quantities, qualities, and other descriptions to comprise the same,] as by the said

his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required.

In this covenant the following parts deserve attention :

1st, Of the covenantor ;

2dly, The person with whom the covenant is to be entered into ;

3dly, The person by whom the fine is to be levied ;

4thly, The time within which it is to be levied ;

5thly, The persons to whom it is to be levied ;

6thly, In what court ;

7thly, Of what parcels ; And,

8thly, Whether with proclamations.

The covenant in its most simple state is in this form :

And the said *A. B.* for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said *C. D.* his heirs and assigns, in manner following ; (that is to say,) that he the said *A. B. &c.*

But in its application to practice it admits of great variations.

1st, The person by whom the covenant is to be entered into must be directed by the intention of the parties. The object is to obtain as much security as possible for the performance of the act intended to be done. This is more especially the case when the fine is to be a future act ; for instance, to be levied by infants when adult ; or to be levied under some other like circumstances. It is of less consequence when the fine is in point of fact to be levied instantly, and the covenant is a matter of form rather than of substance ; and the party retains, as in prudence he ought to do, his purchase money, or other consideration, till the fine is levied. It is also of very little consequence when the fine is to be a voluntary act, proceeding from the party by way of settlement, with a view to a family arrangement, and merely nominal damages could be recovered for a breach of the covenant ; and of still less consequence is the form of the covenant when a fine is to be levied merely to gain

the fee to a person who has an estate-tail. In those instances, however, in which the covenant is a material and essential part of the security, care is to be taken that no person is pledged to do more than that for which he means to stipulate. Want of caution in this respect may subject a party to an action for damages, contrary to the intention, if that intention had been fully considered and clearly expressed. Several sellers, who are owners of distinct shares, or are joint-tenants or coparceners, ought not, except under special contracts, dictated by peculiar circumstances, to covenant for more than their respective shares; nor ought tenant for life to covenant for more than his life-interest; nor a tenant in remainder or reversion to covenant for more than that interest which shall be conferred by his estate: and the covenant of each should therefore be several, and qualified to the acts of himself and his heirs, and confined to his share, and also to his estate and interest in the parcels; and a husband entitled in right of his wife should covenant only as to the acts and deeds of himself and his wife, and her heirs; and each of several husbands should have his covenant qualified in like manner to the acts of himself and his wife, and his and her heirs, and confined to the share of his wife. And these covenants should be in these or the like forms, varying them as the

circumstances require—And each of them the said *A. B.* and *C. D.* severally, separate and apart from the other of them, doth hereby for himself, his heirs, executors and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and his heirs, covenant with, &c. that they the said *A. B.* and *C. D.* respectively, or their respective heirs, shall or will, &c.

And the said *A. B.* doth hereby for himself, his heirs, executors, and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and his heirs; and the said *C. D.* doth hereby for himself, his heirs, executors, and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and his heirs, and of the said *E.* his wife, covenant with the said *G. H.* and his heirs, that they the said *A. B.* or his heirs, and *C. D.* or his heirs, and also the said *E. D.* (she hereby consenting) shall or will, &c.

And each of them the said *A. B. C. D.* and *E. F.* severally, separate and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and herself respectively, and his and her respective heirs: And each of them the said *G. H.*

I. K. and *L. M.* severally, separate and apart from the others of them, doth hereby for himself respectively, and his respective heirs, executors, and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and his said wife respectively, and his and her heirs, covenant, declare, and agree to and with the said *N. O.* and their heirs, that each of them the said *A. B. C. D.* and *E. F.* respectively, or his respective heirs; and each of them the said *G. H. I. K.* and *L. M.* respectively, and his respective wife, she hereby consenting, and his and her heirs shall or will, &c.

In this and like assurances it is very common, and warranted by books of practice, for a husband to covenant for *himself and his wife*, and his and her heirs, that he and his wife, and their heirs, will levy the fine, &c. This is an inaccurate form, because no action can be framed consistently with the language of the covenant. Besides, this form confounds the lien part, with the stipulating part, or substance, of the covenant. The husband may covenant that he and his wife, and his and her heirs, shall levy a fine. This is a formal covenant. It expresses the intention of the parties in a manner consonant with the rules of law: but though the husband covenants for himself and his wife, that he and his wife shall levy a fine, the wife cannot be subjected to an action upon

his covenant ; and it follows, that it is inaccurate, and confounds all legal distinction, to express the covenant in a form that cannot be made available. It is rather singular that a practice so void of principle should have been adopted so extensively as this has been. When it is deemed proper that the consent of the wife to join in the fine shall appear in the deed of uses, this consent is expressed either in the introductory part of the husband's covenant, or in the body of the covenant itself. In one form, the husband will, with the privity, consent, and approbation of the said his wife, testified by her executing these presents, for himself, his heirs, executors, &c. covenant, &c. that, &c.—In the other form, the husband for himself, his heirs, &c. will covenant with, &c. that he and his wife (*she thereby consenting*) shall and will, &c. The object of this consent is to create an equity against the wife ; but no case warrants an opinion that the wife can be bound by this consent.—The utmost a court of equity has ever done, is to bring the husband into contempt, for want of a specific performance of the covenant ; and thus enforcing a fine from the husband and wife by strict measures against the husband. The cases on this point are *Barrington v. Horne* (x), *Ortred* or *Outram* v.

(x) 5 Vin. Abr. 547. pl. 45.

Round (y), *Hall v. Hardy* (z), *Winter v. Devereux* (a), *Sedgwick v. Hargrave* (b), *Stephenson v. Morris* (c), and *Withers v. Pinchard*, cited in the last case.

They were considered in the late case of *Emery v. Wase* (d), and the observations made on them by Lord Eldon were, that
 “ by this appeal I am called upon to reverse
 “ a judgment that appears to have been
 “ made upon great consideration. Certainly
 “ the general point is of great importance :
 “ whether the contract of the husband,
 “ which however this was not intended to
 “ be, but that of the daughters, is to be
 “ executed against the husband by a court
 “ of equity ; in effect, compelling the hus-
 “ band to compel his wife to levy a fine,
 “ which is a voluntary act. This is brought
 “ forward in the report as the principal
 “ ground of the decree. The argument
 “ shows, that point is not quite so well settled
 “ as it has been understood to be. The po-
 “ licy of the law is, that a wife is not to part
 “ with her property, but by her own spon-
 “ taneous and free will. If this was per-
 “ fectly *res integra*, I should hesitate long
 “ before I should say, the husband is to be

(y) 4 Vin. Abr. 203.

(c) 7 Ves. Jun. 474.

(z) 3 P. Williams, 187.

(d) 5 Ves. Jun. 846. 8 Ves.

(a) Note to 3 P. Wms. 189. Jun. 505.

(b) 2 Vez. 57.

“ understood to have gained her consent;
“ and the presumption is to be made, that
“ he obtained it before the bargain, to avoid
“ all the fraud that may be afterwards prac-
“ tised to procure it. I should have hesi-
“ tated long in following up that presump-
“ tion, rather than the principle of the
“ policy of the law ; for, if a man chooses
“ to contract for the estate of a married
“ woman, or an estate subject to dower, he
“ knows the property is her's altogether, or
“ to a given extent. The purchaser is bound
“ to regard the policy of the law ; and what
“ right has he to complain, if she, who, ac-
“ cording to law, cannot part with her pro-
“ perty but by her own free will, expressed
“ at the time of that act of record, takes
“ advantage of the *locus penitentiae* ; and
“ why is he not to take his chance of da-
“ mages against the husband ?

“ If the cases have determined this ques-
“ tion so, that no consideration of the ab-
“ surdity that must arise, and the almost
“ ridiculous state in which this court must
“ in many instances be placed, can prevail
“ against their authority, it must be so.
“ For the sake of illustration, suppose 10,000l.
“ 3 per cents. carried to the account of a
“ married woman, and the husband con-
“ tracts to transfer (taking it, that the court
“ had jurisdiction to decree performance of

“such a contract). At the hearing, what is
“to be done for the wife? In the two last
“cases, the wife appears to have been left
“a party to the suit, without affecting her
“under the decree. If the court cannot by
“the decree order any act to be done by
“her, the bill ought to be dismissed against
“her, unless some future act by her, to be
“ordered upon further directions, is looked
“to. But the principle of the decree shows,
“that cannot be the purpose. It does not
“rest there. Suppose the husband procures
“her consent, even by the mildest means;
“persuades and influences her by the diffi-
“culties he has got into, on entering into an
“improper contract; and she is examined
“here by the judge who has made the de-
“cree upon the husband: and if upon the
“submission of all the considerations which
“ought to be submitted to her in this court,
“and the court of Common Pleas, she says
“she thinks it in her situation not fit for
“her to part with the property, the court
“must send the husband to gaol; telling
“her, she never ought to relieve him from
“that state: and all this for the benefit of
“a person, who cannot have a specific per-
“formance certainly, but who may have
“damages, and who sets up his title to a
“specific performance in opposition to the
“policy of the law. Upon the first ground,
“therefore, there is difficulty enough to

“ make me pause, before I should follow
“ the two last authorities ; and I am not sure
“ whether it is not proper to have the judg-
“ ment of the House of Lords, to determine
“ which of these decisions ought to bind us.
“ As to the expression used by Lord Cow-
“ per, that this jurisdiction is to be very
“ sparingly exercised, certainly it is very
“ dissatisfactory to be informed, that it is,
“ and it is not, to be done.”

And in another part of the judgment his Lordship said, “ If the law is, that the husband signing will authorize and require the court to call upon him to procure her to join, his signature would do just as well as her’s ; unless it is to be implied, that the daughters were actually to sign it. But that would be a great deal too nice ; for their mere signature could not be a circumstance operative as evidence of the contract.”

And his Lordship added, “ If the court will bind the husband, to procure his wife’s consent, Lord Cowper’s declaration is authority for saying, I ought not to make that decree, where I am not completely satisfied by the evidence, that the price has been as deliberately fixed, at least, as it ought to be in the ordinary case in a transaction between persons dealing prudently and deliberately in estimating a matter of so much consequence.”

From the forms in the *Appendix*, as well as from the decided cases, it will be a necessary inference, that a person may be made a party to the covenant, to stipulate for the acts of himself and his heirs, or for the acts of a stranger, or some person with whom he is connected, or some person in whose concerns he takes an interest. The estates of infants, or their rights and titles, are frequently the subject of contract; and fines will be necessary to be levied by them when they are adult, to complete the title, by reason of coverture or entails; and, on these occasions, some friend is generally found to covenant respecting the acts to be done by the infants or their heirs. The other instances in which such covenants are entered into, are, for the most part, relating to lunatic or other incapacitated persons, and persons who are absent beyond seas. On the one hand, the person who is to enter into the covenant, is to be careful he does not take on himself more responsibility than he intends; on the other hand, the purchaser, or person to be benefited by the covenant, must take care that he has stipulations for all those acts necessary to perfect the title. The nature and circumstances of the title must be fully considered, and the stipulations of the covenant must be extended to all those persons who may be interested, and who, in order to

complete the title, must be parties to the fine.

2dly. *Of the persons with whom the covenant is to be entered into.* On this point it is necessary only, that there shall be a covenantee, in whose name an action may be brought, in default of performance of the covenant. In general, the covenant is with the purchaser, if any, or with the releasee to uses, or with the trustees to whom the conveyance is made. The covenant may with propriety be to several and *their heirs*, notwithstanding the rule, that on a fine to be levied to two, the acknowledgment of right ought to be to them and the heirs of one of them, naming that person (e). The covenant should not, however, be entered into by a husband with his wife. On account of the legal unity of their persons, she is not capable of a covenant or grant, proceeding from her husband. No well-founded objection exists against naming a married woman as the *covenantee*, where the covenant is entered into by any other person than the husband. Except in particular cases, the covenant should be entered into, so as to be annexed to the estate, if any, conveyed by the deed, in the lands of which the fine is to be levied.

(e) See 1 Vol. p. 237.

3dly. *The covenant should name the person by whom the fine is to be levied.*—The intention of the parties, and the nature of the contract between them, must dictate the language of the covenant in this particular. The object of covenant, is to secure a performance of the act intended to be done, or a compensation in damages for a breach on non-performance of the covenant. It is from the covenant alone that the intention of the parties can be collected ; and it is on the terms of the covenant, and acts done, or omitted, in contravention of the covenant, that an action must be framed. Thus, suppose *A.* and *B.* are to levy a fine, and *A.* alone is named in the covenant, and *B.* is omitted, no action can be maintained for the refusal of *B.* to join in levying the fine. The persons to be named may be either covenantors, or other persons for whose acts they stipulate. When it may be necessary to complete the title, that a particular person, or in case of the death of that person, his or her heir at law, shall join in levying the fine, the covenant should extend to the heirs by that name ; and it is prudent, at least, though not perhaps absolutely necessary, that the “*issue*” or *heirs of the body*, should be named in the covenant, in those instances in which an entail is to be barred. In short, the covenant should embrace, either by spe-

cial or general words, all persons whose concurrence may be necessary; and with this view, the state of the title, and the acts necessary to complete it, should be fully considered. It is with reference only to the circumstances of the title that the covenant can be framed with accuracy.

4thly. *The time within which the fine is to be levied*, should also be defined by the deed, and, if circumstances will admit, the fine should be acknowledged immediately, or at the same time, at which the deed is executed. In most instances, the covenant is to levy the fine, as of the preceding or before the end of the next term. In case the fine is an essential part of a conveyance by a married woman, it is rarely prudent to suffer the interval till the next term to elapse; and the same observation equally applies to a fine by tenant in tail. Many accidents may happen to disappoint the expectations of the parties. The wife may refuse at a future period, or she may survive her husband, and afterwards refuse; or she may die in his life-time, and leave an heir not bound by the covenant, and whose interest it will be to frustrate the intention of the parties: and tenant in tail may die, leaving issue, and such issue may refuse to complete the conveyance. The issue are not

bound to perform the covenants or articles of the tenant in tail (*f*). Of course the covenant allows of too much latitude when it runs in this form, viz. the said or their heirs, shall or will, in or as of term now last past, or in or as of some subsequent term, acknowledge and levy the fine, &c. A covenant in this form can never be broken during the life of the persons by whom the fine is to be levied, since they have the period of their lives for the performance of the covenant, at least unless hastened by request; and as the cases admit of some doubt, what acts may be done by the party in performance of his covenant, at any time during his life, and what acts may be hastened by request, the covenant, when allowing a latitude of this description for levying the fine, should have the language proper to hasten the fine by request. The covenant would then be to this effect: That the said or their heirs, shall or will, in or as of term last past, or of term now next ensuing, or in or as of any other subsequent term, when thereunto required by the said or his heirs, acknowledge and levy, &c. These observations are more particularly relevant to transactions of purchases, settlements, &c. In mere voluntary acts, as in settlements to

(*f*) *Ross v. Ross*, 1 Ch. Cas. 237. *Weale v. Lower*, 1 Eq. 171. *Jenkins v. Kemys*, 1 Lev. A. 266.

be made by a fine by husband and wife of the lands of the wife, the form of the covenant, in this particular, is of no material consequence, since it never can be expected to be the subject of an action for damages; and, from choice, it is more adviseable to leave the time, within which the fine is to be levied, open to the discretion of the parties. So in those cases in which there is not any intention of levying the fine immediately, but the covenant is taken merely with a view of securing the right to have a fine, if a fine shall be deemed adviseable, the time of levying the fine ought, in strict propriety, to be governed by the request of the covenantee. Also, when the stipulation is, that the fine shall be levied by persons who are infants, or by persons who may be interested, but who are not precisely ascertained, the circumstances of the case must prescribe the form of the stipulations of the covenant.

5thly. *To whom the fine shall be levied.*— With a view to an action for damages, the covenant should stipulate that the fine shall be levied, either to particular persons, or, as the intention may require, to persons to be named or designated by request. In technical propriety, the fine, when levied to two, should be to them and the heirs of one of them. With a view to a case thus circumstanced, the general form of covenants is to

acknowledge and levy a fine to the said *A. B.* and *C. D.* and their heirs, or the heirs of one of them. The more correct form is to covenant to levy the fine, to the two and the heirs of *A. B.*, or to the heirs of one of them, generally, without ascertaining the person to whom the inheritance is to be granted. The intention may also call for other forms in this part of the covenant. Each species of fine, and, in particular, the fine *sur concessit* for years, requires some variations to adapt the covenant to the nature of the fine. These variations should keep in view the form of the fine to be levied, so as to prescribe with precision the acts which may be necessary to be done, and secure the right of having them observed. It must not, however, be forgotten, that, with a view to the operation of a fine by way of nonclaim, the fine should be levied by or to a person who has an estate of freehold. It is not necessary, as some have imagined (g), that the conusor or conusee shall have the *immediate freehold*. It is sufficient that he has an *estate of freehold*, in reversion or remainder. This may be collected from those authorities (h) in which it has been decided, that a fine levied by a person seised of an

(g) *Rowe v. Power*, 1 New *hampton v. Carhampton*, Irish Rep. 32. T. Rep. 567. Jenk. Cent. 254.

(h) Co. Litt. 208, a. *Car-*

estate in remainder or reversion, may operate to bar the title of a stranger, even for the benefit of the tenants of prior estates connected, in privity of estate, with the person by whom the fine is levied. These observations are intended to support the authority of *Anne Twist's case* (i), though the decision in that case was lately questioned. (k)

In *Anne Twist's case*, one seised of lands in fee, married a wife, and after made a lease of this land to *A.* for life, the remainder to *B.* in fee; and *B.* levied a fine with proclamations, and the husband died; and the wife did not make her claim, &c. within five years after the death of her husband; thereby she was barred of her dower for ever, notwithstanding the estate for life in *A.*; but if the remainder of *B.* had been put to a *right at* the time of the fine levied, she might have avoided the fine by plea, *quod partes finis nihil habuerunt*, &c.

The ground of *Anne Twist's case* is, that the widow had merely a right or title of dower; that this right or title was to be enforced against *A.* during the continuance of his estate, and, after the determination of that estate, against *B.* The fine levied by *C.* was sufficient to protect his estate against

(i) Shep. T. 28. Hob. 265.

(k) 1 New Rep. 37.

all rights and titles not enforced in due time ; and the prior tenant for life may take the benefit of the fine, as the more effectual means of protecting the title of *B.* who claims under the same title as *A.* and in opposition to the widow. The principles of this doctrine are in *Co. Litt.* 298, a. in which this passage will be found:—" By this some
" have gathered, that if a disseisor make a
" lease for life, reserving the reversion to
" himself, and the disseisee confirmeth the
" state of the disseisor, that he may enter
" upon the lessee, because the estate of him
" in the reversion dependeth not upon the
" state for life, as the remainder : but all is
" one ; for by the confirmation made to him
" in the reversion, all the right of him that
" confirmeth is gone, as well as when he
" maketh it to him in remainder ; and he
" cannot, by his entry, avoid the estate of
" the lessee for life ; but he must avoid the
" state of the lessor, which against his own
" confirmation he cannot do ; and it hath
" been adjudged, that if a disseisor make a
" lease for life, and after levy a fine of the
" *reversion* with proclamations, and the five
" years pass, so as the disseisee is for the re-
" version barred, he shall not enter upon the
" lessee for life."

From this passage it will be collected, that a fine may operate by way of non-claim, though it is levied by a person who has not

the immediate freehold, but merely an estate of freehold in reversion, expectant on an estate of freehold in another person. This point is fully treated of in the former volume, in the chapter on Fines.

6thly. *The covenant ought also to stipulate in what court the fine shall be levied.*—It is necessary to the validity of a fine, that it shall be levied in a court having jurisdiction. The greater part of the lands in the kingdom lie within the jurisdiction of the courts at Westminster; and as to many lands, the courts at Westminster and the inferior courts have a concurrent jurisdiction; and a fine, as a conveyance, may be levied in either court with equal effect; except that fines in *inferior courts* cannot, unless there is an act of parliament for the purpose, be levied with proclamations so as to bar the issue in tail, or confirm a title by nonclaim. Lands in *ancient demesne* are within the jurisdiction of the courts of Westminster; but to levy a fine of lands in ancient demesne in the courts of Westminster is a deceit on the lord, and he may reverse the fine by writ of disceit. Till the fine is avoided, it remains in force, and governs the title. When avoided by the lord it is said to be avoided as between the parties. If levied with proclamations, it will bar the issue in tail, or may gain a title by nonclaim; and yet a

fine levied in the courts of ancient demesne cannot be proclaimed without a custom for that purpose, and consequently can neither bar the issue in tail, or give any security to the title by way of nonclaim. It is said, however, that under a custom, a fine with proclamations may bar an intail of lands in ancient demesne (*l*). When there is an intail of lands held in ancient demesne, a customary recovery should be suffered in the lord's court. By this assurance, the intail and the remainders expectant thereon may be barred. Even without a custom, a fine in the lord's court will have every operation of a fine at the common law. It may discontinue an estate-tail, although it cannot bar it (*m*). Titles depending on fines levied in the courts at Westminster, of lands in *ancient demesne*, generally become involved in great confusion. As the law on this subject is interesting, and not collected in any particular work, it may be acceptable to state some points on this subject, and to suggest some of those difficulties which arise in practice.

1st. The fine, while it remains in force, is good as between the parties, and will operate as against all persons claiming under the

(*l*) Dyer, 373. Lord Coke (*m*) *Hunt v. Bourne*, 1 Salk. treated the custom as void. 4 240. 1 Vol. p. Ins. 270.

conusor (*n*); and, even (though this is doubtful) the issue in tail; with the exception of the lord of the manor, by reason of his right to avoid the fine, as a *disceit* against him.

2dly, Though the fine first levied, when that fine is the act which changes the lands from the customary tenure to the tenure by ancient demesne can never become a bar to the right of the lord to avoid that fine by *disceit*, a subsequent fine may operate by way of nonclaim, and bar to the remedy of the lord (*o*). The first fine is injurious to the lord, but, upon the technical rule, that *non potest adduci exceptio ejusdem rei cujus petitur dissolutio* (*p*), this fine can never operate to bar the lord. The same objection does not hold against a second fine (*q*): and, when the lord is barred of his remedy by writ of *disceit*, the lands will, it is apprehended, though with some doubt, become positively and absolutely frank-fee. It is obvious also that a first fine may operate by nonclaim when the tenure is changed into frank-fee.

3dly, When the lord avoids the fine by *disceit*, and the lands are restored to the tenure of ancient demesne, the fine, as a fine, is as to the lands of the tenure of ancient

(*n*) 1 R. Abr. 326. l. 42.

Plow. Com. 370.

(*o*) 2 Inst.

(*q*) 2 Inst. 519. Plow. Comm.

(*p*) Bac. Maxims, Regula. 370. in Marg. T. Raym. 462.

demesne, and these lands only (*r*), actually avoided, as between the parties, and all persons claiming under them (*s*); and, in consequence, there is not any change of tenant; but a confirmation or release will preserve the right of the tenant (*t*). By means of a fine, the lands become frank-fee, so long as the fine remains in force. The regular mode of avoiding the fine, and restoring the land to the jurisdiction of the lord in ancient demesne, is to prosecute a writ of disceit. It often happens, that after a fine has been levied, and before it has been actually avoided by writ of disceit, the parties levy fines or suffer recoveries in the court of ancient demesne; and it becomes a question whether these acts are not to be considered as *coram non judice*, by reason of the former fine, and that the lands are frank-fee for the time.

This question involves some nicety; nor can the law on this point be clearly collected from the books. In one case (*u*), it seems to have been supposed, that the lands might remain ancient demesne, as against persons claiming under a paramount title, although they were frank-fee as between the parties,

(*r*) 1 R. A. 327. 1. 16. 25.

(*t*) F. N. B. 98. A.

(*s*) 4 Inst. 270. Com. Dig.
Anc. Dem.

(*u*) 50 E. 3. 10. 25. 50 E. 3.
24. b. 1 R. A. 326.

and even against the lord. But in *Kitchen* (x), a recovery suffered in the court of ancient demesne, while the lands were frank-fee, is treated as *coram non judice*; and the case in which the parties sued in ancient demesne, while a disseisin was in force, seems to have been in the instance of a disseisin by the lord (y). So if fines are levied or recoveries suffered in the courts of Westminster-hall, during the time the lands are held as frank-fee, it is difficult to comprehend how these assurances will be binding on the title, in the event that the original fine shall be avoided, and the lands restored to the tenure of ancient demesne. The lord cannot be bound by the acts of his tenant, except by a fine and non-claim. It has sometimes been supposed, that a writ of disceit is in the nature of a writ of error, and limited by the statute-law (z) to twenty years. That statute, however, does not seem to apply to any errors, except those of form. From the preamble, it is nearly evident that the statute does not extend to the want of right to levy the fine or suffer the recovery, or the want of jurisdiction in the court to entertain the fine or recovery.

If it were quite certain, as the better opi-

(x) On Jurisdiet. p.

(z) 10 & 11 W. 3. c. 14.

(y) 1 R. A. 325. 1. 5.

nion seems to be (a), that persons having paramount titles could not sue in the courts of ancient demesne, while the lands remained of the tenure of frank-fee, it would be clear that a release or confirmation by the lord, having the fee-simple, or any other act which puts an end to the right of avoiding the fine or recovery by writ of *disceit*, would make the lands completely frank-fee (b), and the title free from all objection, except as against the claims of all those who had any subsisting titles; and they must sue in the superior courts, instead of suing in the courts of ancient demesne, for establishing these titles. This will make the theory consistent. It seems a solecism in law, that the lands shall remain, as of the tenure of ancient demesne, as against persons having *paramount* titles, while they are frank-fee as against the lord, to whom alone the fine or recovery is supposed, by law, to be an injury. These observations, however, are not intended to deny that lands may become frank-fee for a time, as by a fine, for life; a release of the seignory, by a person who is tenant for life, or by a confirmation for life. In all these and the like instances (c), it is reasonable, and quite consistent with principle, that the

(a) F. N. B. 98, 2. Salk. 57.

1 R. A. Ant. Dem. 7.

(b) Salk. 57. & F. N. B. 98.

(c) 1 R. A. 325, 326. Kit.

Jurisd. 97, b, 1 R. Abr. 325.

1. 42.

lands should be considered as of the tenure of ancient demesne, when the act by which they were made frank-fee, for a time, ceases to have operation. It will easily be imagined, that, during the interval, the title will be involved in considerable difficulty, rendering it extremely doubtful to ascertain in what court, *viz.* the court of ancient demesne or the superior court, those assurances by which the title is to be regulated, as fines and recoveries, ought to be transacted. The sole object of these observations is to suggest caution, and stimulate inquiry ;—with very little confidence, that the observations which are submitted to the reader, can be implicitly or safely relied on.

The law on titles involving these circumstances requires a very careful and minute investigation. Lands within the *counties palatine*, and also lands in *Wales*, are within peculiar and exclusive jurisdictions. The fine must be levied in the courts having jurisdiction over those lands. There is no concurrent jurisdiction in the courts at Westminster ; and a fine levied in the court of Common Pleas at Westminster, of lands in one of these peculiar and exclusive jurisdictions, is considered as *coram non judice*, and is *actually void*, and not merely voidable (*d*).

(*d*) 2 Inst. 557. 4 Inst. 205.

The covenant should also stipulate upon whose request, and at whose cost and charges, the fine is to be levied. This stipulation must vary with the circumstances. The request ought, for the most part, to proceed from the persons interested in having the fee levied, or by those who are named as trustees to protect the interest of other persons. The necessity, also, of expressing any request, is superseded in those instances in which the time is fixed within which the fine shall be levied. Other variations take place respecting the costs. As often as a fine is necessary to complete the title of a vendor, or discharge the incumbrance of dower, the general practice is to have the fine levied at the costs of the seller; but if such fine is merely by way of caution rather than necessity, it ought, in good reason, to be at the expense of the purchaser or person by whom it is required. When a husband and wife levy a fine to convey the estate, or to bar the claim of the wife, with a view to any arrangement for the benefit of the husband, or any family arrangement, it is of course that the fine shall be levied at the expense of the husband. Tenants in common, coparceners, joint-tenants, and other persons having partial interests, do, for the most part, contribute towards the expense of a fine in the proportions in which they are interested.

The reasonable practice is, to adapt the regulation so as to take the expense out of the fund. It is by no means unusual to make tenants in common and other part-owners contribute in equal shares towards the expense of a fine, although their shares are very unequal. In short, the expression of the deed must vary with the intention of the parties; and it follows, that the intention must be consulted before it can be expressed.

8thly. *As to the parcels.*—The fine ought, either in terms, or by reference, to specify, or at least comprise, the parcels of which the fine is to be levied. Sometimes the parcels are described in a former part of the instrument, as is the case when the instrument contains a conveyance of the lands; or the parcels are introduced by way of recital. In that case, words of reference to the parcels are sufficient. These words may be more or less specific, according to the circumstances. Nothing more is necessary, than to express the intention of the parties clearly and distinctly, so as to leave no doubt of the intention. When all the parcels are to be included, the reference may be general, in these or the like terms, *viz.*

All the messuages, &c. hereby released, or otherwise assured, or intended so to be.

Should the intention require a selection or

specification, the words proper for that purpose must be introduced, and some prominent and distinguishing circumstance should be fixed on. The following forms will suggest the variations which generally occur in this part of the deed, viz.

The said messuage, &c. hereinbefore described, to be called ; or

The said messuage, &c. hereinbefore in part described to be situate in the parish of ; or

The said *hereinbefore described to be in the tenure or occupation of* ; or

The undivided moiety or half part, late of the said A. B. of and in the messuages, &c. hereby released, &c. ; or

Of and in the messuage, &c. hereinbefore described, to be called, &c.

These examples, which admit of infinite variety, will sufficiently call the attention to the point material to be observed in this part of the deed. As often as the deed is independent of any other conveyance than the intended fine, the parcels are to be described fully in the covenant, or in some other part of the instrument ; or at least they are to be described by such general and comprehensive terms, as will have the twofold object of embracing the parcels of which the fine is to be levied, and excluding all other parcels not intended to pass by the fine. The

advantage of a full description is great, and very sensibly felt, as often as it may be necessary, on account of any omission of parcels in the fine, to move the court, in which the fine is levied, for an amendment in regard to the parcels. There is also the advantage common to all other transactions, that the certainty of the parcels will wholly, or in a great measure, appear from the internal evidence of the deed, without reference to the other deeds, which eventually may be lost; or to extraneous evidence, which it may be difficult to procure. The general rule respecting parcels seems to be, to preserve the same description, as near as may be, through successive deeds; to make no variation in them, except in cases which necessarily, by reason of some division or change in the nature of the property, or the like circumstances, call for such variation. On this subject, the observations most material to be regarded in practice, will be introduced in the chapter treating of Releases. No one, except those that are in the habit of perusing a great number of abstracts, can easily judge of the inconveniences which arise from frequent changes in the description of the parcels. As connected with this subject, it is also to be noticed, that the covenant either enumerates the names by which the parcels are to be described in the fine, as by the name of 10 messuages, &c.

generally adding (by way of taking off the materiality of any error in this particular) the clause, "by such other name and names, &c.;" or the covenant merely refers to the general mode, in which the parcels shall be comprised, without descending to enumeration. The latter mode gives least trouble in practice; and the only preference due to the former mode is, that it fully declares the intention of the parties, by ascertaining the denomination under which the parcels are to pass, and bringing the case within those decisions, by which it has been held, that the parcels may pass by any denomination given to them by the parties (e).

The covenant also expresses, that the fine is to be with *proclamations*. This is done without any regard to the circumstances whether the proclamations are material to the object of the parties in levying the fine. It arises from the practice, that most fines are now levied with proclamations, without considering whether the proclamations are necessary, or may eventually be of any advantage. The omission of this part of the covenant would not be deemed of any importance, except in those cases in which the sole use of a covenant is to afford the right to specific relief in equity, or to damages in an action at law, for a breach of the covenant. In

(e) See 1 Vol. p. 237.

many instances, the covenant is rather form than substance. It is of the latter description only, when it may be necessary to resort to the covenant as the means of affording a compensation in damages for a breach in the observance of it; and the covenant should be prepared with this view in all those cases in which any other person than the covenantor is interested in having a performance of it. The exceptions only are in those instances in which the fine is acknowledged at the same time that the covenant is executed; and the material part of the intention is accomplished by this more effectual part of the assurance.

Of the Declaration of Uses.

A well prepared declaration will be in this form, or to this effect, namely,—

And it is hereby granted, declared, and agreed by and between all the said parties to these presents, as far as they are interested in the premises, and they hereby severally and respectively direct and appoint, that the fine or fines to be so as aforesaid, or in any other manner, or at any other time or times, acknowledged and levied; and also, all and every fine and fines, common recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter, acknowledged, levied, suffered, made, and executed of the said , hereby or intended so to be, or any of them, or any part or parcel of the same, either alone or jointly with any other lands, tenements, or hereditaments whatsoever by or between the said parties to these presents, or any of them, either alone or jointly and together with any other person or persons whomsoever, or to which they or any or either of them, is or are, or shall or may be, parties

or privies, or a party or a privy, shall be and enure, and shall be construed, adjudged, expounded, decreed, and taken to be and enure, and the same is and are, and was and were meant and intended, and is and are hereby directed and declared to be and enure; and that the person or persons to whom the said fine or fines, common recovery or recoveries, and other assurances respectively, have and hath been and shall or may be levied, suffered, made, and executed, shall stand and be seised, as to, for, and concerning the said hereby and every part and parcel of the same, with their and every of their rights, members, and appurtenances, to the use, &c.

. This declaration embraces various objects:

1st. It expresses by whom the declaration is made.

2dly, The fines or other assurances of which the uses are to be directed by the declaration.

3dly, The parcels to which alone the declaration applies.

1st. It is highly proper that the declaration should express the parties between whom it is made; and the attention is to be directed to the object, that the declaration shall be the language of all persons con-

cerned in interest, and who have a right to direct the uses of a fine.

These and the following observations will be found equally relevant to the declaration of the uses of a fine, and the declaration of the uses of a recovery.

In *Nightingale v. Ferrers*, (n) “ Robert
“ Earl Ferrers, being seised for his life only
“ of his family estates, with remainder to his
“ first, &c. sons in tail male successively, had
“ several sons, the first of whom, named
“ Robert, was an infant of about seventeen.
“ A very advantageous match being agreed
“ upon, betwixt the eldest son and the only
“ daughter of Sir Humphry Ferrers, articles
“ were entered into, dated the 26th of Sep-
“ tember, 1688; and the Lord Ferrers and
“ his eldest son Robert were parties to, and
“ sealed the said articles, whereby the Lord
“ Ferrers covenanted, that he and his said
“ eldest son should, within a year after the
“ son should come of age, by fine or reco-
“ very, or such other good conveyances or
“ assurances as the lady’s counsel should
“ advise, convey and settle the bulk of the
“ family estate to certain uses, &c.

“ The marriage took effect, and the infant
“ eldest son, having thus, during his infancy
“ sealed this deed, together with his father,

(n) 3 P. Wms. 206.

“ afterwards came of age, and pursuant to
“ the covenant, within the year after coming
“ of age, viz. in Michaelmas term then next
“ following, joined with his father in levying
“ a fine and suffering a recovery ; but there
“ was no deed, after the most diligent search,
“ to be found, for leading the uses of this
“ fine and recovery. Afterwards the Lord
“ Ferrers revoked the uses of all the premises
“ limited to his younger sons and their issue,
“ except as to the manors of Astwell and
“ Falcott. Robert Shirley, the eldest son,
“ soon after died, as did also his said wife,
“ leaving issue only one daughter, who was
“ afterwards married to the Earl of Northamp-
“ ton. And the late Earl Ferrers, and also
“ the sons who were elder than the present
“ Earl Ferrers, (who had been found a
“ lunatic), were dead without issue male.

“ This matter was formerly stirred before
“ the Lord King, who was of opinion, that
“ the said articles could be intended as pre-
“ paratory only to something further, and
“ would not, of themselves, amount to a
“ declaration of the uses. But now coming
“ again before his Honor, he observed,
“ Though slight words will declare the use
“ of a fine, &c. yet here are *no words at all*.
“ used by the infant son, who did, it is true,
“ join with his father in executing the
“ articles, but it was the Lord Ferrers, the

“ father only, who covenanted, that he and
“ his son would levy the fine, and suffer the
“ recovery to these uses. The most then
“ that can be made of this case is, that here
“ a fine and recovery by the father and son,
“ the one tenant for life, the other remain-
“ der-man in tail; and the uses are declared
“ by the father, the tenant for life only,
“ which can in no way affect the uses of the
“ remainder in tail. Neither can it be rea-
“ sonable to interpret the son's sealing a
“ deed (so blind and uncertain in its nature)
“ to divest such infant son of the inherit-
“ ance of this great estate, and to make him
“ but tenant for life thereof. The case put,
“ of an infant's affirming a lease for years,
“ made during his infancy, by acceptance of
“ the rent after he comes of age, is not si-
“ milar; because there the rent is in lieu of
“ the profits of the land; whereas in the
“ principal case no rent was reserved, nor
“ any inheritance given to the son in return
“ for the inheritance of this great estate,
“ which the other side would construe him
“ out of. Besides, this is a stale point,
“ given up by Earl Washington, the present
“ Earl's elder brother, who gave the Earl
“ and Countess of Northampton 15,000*l.* to
“ join in a fine and recovery, to re-settle the
“ whole family estate, which accordingly has
“ been done in a solemn manner, and some
“ provision (though a small one) has been

“ made for the unfortunate present Earl,
“ the lunatic. Wherefore the Master of the
“ Rolls, agreeably to the opinion of Lord
“ King, disallowed and overruled this claim;
“ as likely to put the lunatic Earl to an
“ unprofitable expense, and an unsuccessful
“ suit.”

Whether a like case would receive a like decision at this day may be doubted. It will be sufficient, however, that the intention of the parties to declare the uses, shall appear; and it may be done by an agreement less formal than the precedent given in this work. Even an instrument in the *form of a conveyance* may amount to a declaration of the uses of a fine; and therefore, if husband and wife levy a fine, and afterwards make a conveyance, this conveyance, though not good, of itself, as a conveyance by the wife, may operate as a declaration of the uses of the fine, so as to be binding on her and her heirs. So the declaration in favour of the conusee may be without deed as well as by deed; but uses cannot be declared without a writing. Uses may result to the former owner from the absence of a declaration in writing, or they may be negatived by shewing that a conusee was to retain the benefit of the legal estate, and consequently was to be exempt from uses.

The cases cited in the former volume (o)

(o) 1 Vol. p. 311. *Roe v. Popham*, Doug. p. 25.

will also shew, that when several persons, having distinct estates, levy a fine or suffer a common recovery, and the uses are declared by some only of these persons, the use will result to those owners who do not join in the declaration, according to their former estates. To these observations it is to be added, that if *A.* and *B.* being successively tenants in tail, join in suffering a common recovery, *A.* alone may declare the use; and in the absence of declaration by him, the use will result to him in fee-simple. But when two persons so circumstanced join in levying a fine, each must declare the use *pro interesse suo*, or in default of declaration the use of his estate will result to him.

It has already been noticed, that the uses of a fine already levied cannot be declared by any other means than *a deed*. Such is the express enactment of the statute of 4 & 5 Anne, c. 16.

2dly, It will be sufficient to direct or declare the uses of the particular fine, levied or to be levied; but experience and the information derived from the decided cases, have dictated the caution, that the declaration shall extend to all other fines, &c. levied and to be levied, &c. as well as the particular fine levied or to be levied, of which uses are to be declared. Hence the form is adapted to bring within its scope every fine, recovery, or other assurance, levied or to be levied, &c.

of which the uses are or shall be in an executory state, so as to be reached by this declaration. And when the decisions shall be attentively examined, its utility will be discovered; since every assurance in which any of the parties are or may be interested, so as to give them a right to direct or controul the uses, are within the influence of the language of this form; and the form which appears in its language to be tautologous, will be found, in all its parts, to proceed from decided cases, so that each part has a distinct object.

It is readily conceded, that some parts of this form may be safely omitted. The like observation will apply to almost every other form in general use; but the importance of adhering to correct forms, which clearly and obviously express the intention, and render it free from all ambiguity and nicety of criticism, will reconcile a prudent practitioner to its adoption, except in particular cases, in which it is the first object to keep the expence within as narrow bounds as possible.

Sdly, Of the parcels.—Sometimes all the parcels comprized or to be comprized in the fine, at other times part only of these parcels, are to be the subject of the declaration. Of course, when part only of the parcels are to be comprized, restrictive words must be used, that the declaration may not extend to more parcels than those intended

to pass. Also, as often as the general form extends to all fines levied of those lands of which the fine is intended to be levied, and also to fines which may comprize those and other lands, it is highly expedient that the restrictive clause should be added. That clause is introduced by the words, "as to, for, and concerning," &c.; and there are few instances in which this clause can be safely dispensed with.

Besides this restrictive clause, other clauses of distribution of the parcels may be requisite. This is particularly the case when different uses are to be declared of different undivided shares; or different uses are to be declared of distinct parcels. These and the like circumstances render the repetition of the restrictive clause, "as to, for, and concerning," extremely convenient: and to make the clause run easy, it assumes the following form:—"Shall be and enure, &c. as to, for, and concerning, &c. the mesuage, &c. hereby released, &c. to the uses, upon the trusts, &c. hereinafter limited, expressed, and declared, of and concerning the same, (that is say) as to, for, and concerning ALL that close, &c. called , or as to, for, and concerning one undivided third part or share," &c. In those instances in which expence is an object, the declaration may assume a more concise form, and be

to this effect, *viz.* “ And it is hereby directed,
 “ declared, and agreed, by and between the
 “ parties to these presents, that after the fine
 “ or fines, hereby agreed to be levied, shall
 “ be levied as aforesaid, or in any other man-
 “ ner, the same fine or fines, and all reco-
 “ veries suffered and to be suffered of the
 “ said &c. hereinbefore mentioned,
 “ and intended to be hereby released, or any
 “ of them, either alone or jointly with any
 “ other lands and hereditaments, shall, as to
 “ and concerning the &c. hereby
 “ released, with the appurtenances, operate
 “ and enure to the use,” &c.

The uses themselves must in all cases vary with the intention of the parties, and they may be either general, or very special, according to the intention.

On the rule, that an *use cannot be declared on an use, so as to be executed into estate by the statute of uses*, the common error of declaring that the fine shall enure to the use of the conusee and his heirs, “ to the uses hereinafter limited,” &c. should be carefully avoided, whenever the intention requires that the uses shall be executed into estate by the statute. Under a declaration framed in this manner, the use in favour of the conusee will, *ceteris paribus*, be executed by the statute, and the ulterior uses will be uses in the second degree, and for that reason

mere trusts (*p*). But if the use in favour of the conusee shall be omitted, the other uses will be uses in the first degree, and they will be transferred by the statute of uses into estates, that is, supposing the legal estate of freehold to pass by the fine; for the statute cannot execute any uses declared on an equitable seisin, although such uses may, by analogy, govern the equitable ownership; nor can any uses, to be executed by the statute, be declared of those estates, though passing by fine or any other assurance, which are mere chattel interests, and consequently do not transfer a seisin. Uses may be declared of a fine *sur concessit* passing an estate for lives; but no uses can be declared with effect, so as to be legal estates of a fine *sur concessit* for years.

It has often happened that a conveyance has been made by lease and release, or other grant, to *A. B.* and his heirs, to uses, in such manner, that the uses may be executed by the statute, and a fine has been covenanted to be levied, and the declaration has been, that the fine shall enure to the use of the conusee, (being the releasee, grantee, or feoffee), and his heirs, "to the uses herein-
"before limited," &c. Doubts have been entertained, whether under these circum-

(*p*) *Lady Whetstone v. Atbury*, Cas. Talb. 164. *Hopkins v.*
2 P.W. 146. *Robinson v. Comyns*, *Hopkins*, 1 Atk. 581.

stances, the legal estate will vest by means of the statute of uses, in the releasee or feoffee, as the *cestui que use* of the fine; or will be governed by the uses declared of the release. The declaration of the use in favour of the conusee of the fine is evidently a mistake; and as the fine is for further assurance only, and is an accessional and not the sole operative part of the conveyance, so that the estate passes immediately by the operation of the release or other grant, and the uses arise from the seisin conveyed by the release or grant, and are not suspended until the fine is levied, there appear to be strong and cogent reasons for rejecting the use declared of the fine, so as to leave the release or grant, and the declaration of the uses of the same, in full force; and to treat the fine merely as a further assurance, confirming the release or grant, and the title and uses depending on the same.

In this view of the operation of the several assurances, the uses can never arise upon the fine, to vary or controul the uses declared upon the release or grant. To the declaration of the uses of the fine, it is sometimes expedient to add a further declaration of the particular object for which the fine is levied. This is more especially the case, when one of the objects is to bar an attendant term outstanding in a trustee. As it depends on the intention of the parties whe-

ther the fine shall, or shall not, be deemed to operate, by way of non-claim, against the trustee of the term, it follows, as a measure of proper caution, that the intention to bar the term should be declared in all those cases in which a fine is levied with a view that it shall have this operation.

When there is an agreement for changing the equity of redemption, from the husband to the wife, the intention to accomplish this object should be clear and explicit. The intention should not be left to construction, or to inference. There should be demonstration. A recital disclosing the intention to charge the equity, is proper, and will have the most decided effect. It is also prudent to add an express declaration, in the operative part of the deed.

Words inserted *currente calamo*, are not allowed to produce this change of ownership, the doctrine in *Cooth v. Jackson*, 6 Vesey, 12, 17, 41. seems, however, to have carried the principle to a very inconvenient extent.

On Leases.

A Lease, at the common law, is that species of assurance, by which a person who has the fee-simple, or a particular estate, either in tail, for life, or years, creates a term for *years*, or *at will*, or if he has an estate of freehold, then for a *life* or *lives*, out of that estate, *reserving a reversion to himself*. Hence the difference between an *under-lease* and an *assignment*. At one period it was supposed, that the mere reservation of rent, or of a right of entry by a termor, in an instrument importing to be an under-lease, but in point of fact comprising all the estate of the owner, was an under-lease: in short, that it was a lease as between these parties. But it is now settled, that though the instrument imports to be a lease, yet, if it does, in effect, comprize *all the estate* which resides in the grantor, it amounts to an *assignment*, and is not an under-lease; and a right of entry, or reservation of rent will not change the nature of the estate^(q). And, on the other hand, if it leaves any portion of the estate in the lessor, even a day, or an hour, or a minute, as a reversion, it is an under-lease, and therefore an instrument purporting to be an assignment for the residue of a term, reserving the last day or hour, will operate as a lease of this description.

(q) *Palmer v. Edwards*, Doug. 187.

In order that an instrument may operate as an underlease, a reversion must be retained by the former owner, and consequently the underlease must be for a period, less, in point of time, than the term or estate of the lessor; or, when the grant is for the residue of the term of the grantor, there must be an exception of the last day, or the last hour, or of some other period of the term. This exception, as well as a grant made for *part* only of the period, during which the estate of the grantor is to continue, will leave a reversion in the grantor. It is material that the instrument shall reserve the last portion of the estate; for an instrument may, it should seem, operate as an assignment, notwithstanding it reserves a portion of the estate, being the first part of it, as in the case of an assignment to hold from a day to come, or from an event to happen(*r*), unless it is to happen after the death of a person by express limitation(*s*). It is to be observed also, that this doctrine of underleases applies only when persons, having particular estates, create interests derived out of their particular estates. After the underlease is made by a termor for years, the grantor has, in point of estate, not merely and simply the residue of the time of his original term: he has the same measure of time,

(*r*) Shep. Touch.

(*s*) *Jermyn v. Orchard*, Show. Par. Cas. 199.

duration of interest and estate, as he had prior to the underlease; subject only to that lease. The sole effect of the underlease, is to confer a right to the possession, or other beneficial enjoyment, during the term granted by the underlease; and the lessor in the underlease retains, by way of seignory or reversion, his original ownership, subject only to the right conferred by the underlease.

These observations are material, with a view to the important doctrine of merger and surrenders; for, on the merger or surrender of the interest taken by the underlease, the lessor in the underlease, or his assignees or representatives will have the same degree of ownership and right of enjoyment, as if no underlease had been made. And this reversion in the lessor, though it may be merely nominal, will be an interposed estate, and will prevent the application of the doctrine of surrender or merger, as between the estate of the underlessee, and the estate of any other person than the owner of this reversion, or interposed estate.

The doctrine is also material, with reference to the learning of estates, which may be enlarged by release; and to the remedies by action of covenant(s), which run with the estate; and to conditions in restraint of assignment, but not extending to underleases; for an underlease will not be a breach of a

(s) *Webb v. Russell*, 3 Term Rep. 393.

condition, which is to avoid the lease on assignment (s); nor can the lessor in the original lease maintain debt or covenant against an underlessee, though he might have maintained these remedies in case there had been an assignment instead of an underlease (t).

Underleases afford great facility in rendering titles under attendant terms extremely simple, instead of being very complex. Any number of terms may be assigned to one and the same trustee, for the several residues of several terms, except the last hour of each term. On account of the reversion remaining in each assignor, each term will remain a subsisting interest, without the least danger of merger. The only objection to this mode is, that a captious and unwilling purchaser may contend that each of the former trustees retains a portion of the legal estate, and he may require the estate of each trustee to be assigned for his benefit. Whether this objection will prevail in a court of equity, remains to be decided; and of course the practice cannot be adopted with perfect safety, except in those instances which render it impossible, with any convenience or even certainty, to make a distinct assignment of each term to a distinct trustee; or to assign every alternate term, namely, the first, third, and

(s) *Kennerley v. Orpe*, Doug.
56, 57, 184.

(t) *Holford v. Hatch*, Doug.
182.

fifth terms, to one trustee, and each of the intermediate terms, *viz.* the second, fourth, and sixth terms, to another trustee. In the instance in which this practice of underleases was adopted with great success, the deed was in general terms, amounting to an underlease by all trustees, by whom it should be executed, without knowing who those trustees were, or in what right or in what character they were entitled. The deed was therefore adapted to the state of the title, whatever might be the circumstances or right of the persons by whom it should be executed. The material part of this deed, relevant to the point under consideration, will be found in the Appendix. The draft ultimately received the sanction of some of the most eminent conveyancers, and has since been followed, in some instances, for the convenience of having all the terms in one trustee, instead of having different trustees for different terms(*u*).

(*u*) The objection which has been anticipated, may be obviated by making in the first instance an underlease to one trustee from the several termors, and afterwards an assignment from these termors to a distinct trustee. The underlease would confer a title composed and united of the several ownerships by the different termors, without involving the learning of merger, while the subsequent

assignment would bring all the terms into the other trustee merging, though without any prejudice to the title, such of the terms as admitted of being merged from the circumstance of their standing in that relation under which one term may merge in another; or the union of three or more terms may cause the merger of all except the latter of these terms.

In *Scott v. Fenhoulet* (u), the Chancellor seems to have decided, that an underlease purchased by the reversioner who was the owner of the inheritance, but leaving an interposed beneficial interest in some other person, will not become attendant on the inheritance, by the implication of a court of equity ; but he distinctly admitted, that the term, comprised in such underlease, might be made attendant by an express declaration. In creating several underleases out of several terms for years, no objection can be made, that the terms are not attendant, when the precaution is taken, of having an express declaration, that the terms shall be attendant ; and this is a precaution not likely to be omitted in a case of this nature, which necessarily calls for attention to the object to be accomplished, and one of these objects is to make the terms attendant on the inheritance.

In abstracts of title, it frequently happens that there are two terms for years, one derived out of the other ; as a term of 900 years carved out of a term of 1000 years. It is important to have it understood, that the term of 900 years is the estate which confers the right to the immediate possession ; and it may be safe to dispense with an assignment of the term of 1000 years, even when it would

(u) 1 Bro. Ch. Cas. p. 69.

be the height of imprudence to suffer the term of 900 years to remain outstanding. It is also material, that the term for 900 years may be merged in the term of 1000 years, or may be surrendered to the person who is the owner of that term; but the term of 1000 years can never merge in the term of 900 years; because a more remote estate can never merge in a prior and more immediate estate. For the same reason, the owner of the term for 1000 years cannot make an actual surrender to the owner of the term for 900 years. The character of *lord* exists in the owner of the term for 1000 years, and the termor of 900 years is a *tenant* to him. Other circumstances, deducible from the same principles, will be found in the chapter on Lease and Release; and it will appear, that the term of 1000 years may be enlarged by release from the owner of the inheritance, but the term of 900 years cannot be enlarged while the term of 1000 years is subsisting; and it will subsist till it is forfeited, surrendered, or an end is put to it by some other means.

At the common law, no man could grant a lease, to continue beyond the period at which his own estate was to determine; for the rule of that law is, "*cessante statu primitivo, cessat derivativus*:" so that whenever the estate of the lessor determines, it involves

with it the determination of the estate of the lessee. But leases made under powers, owe their effect to the power under which they are created, and not merely and simply to the estate of the lessor ; and a lease made under a power may continue, notwithstanding the determination of the estate of the person by whom the power is exercised.

In the instance of leases by tenant in tail, there is one peculiarity. Originally the estate of the lessee is determinable on the failure of the issue inheritable to the estate-tail ; but when a common recovery is duly suffered by the tenant in tail, the estate-tail is enlarged into a fee-simple, and the term, instead of being determinable on the failure of the issue inheritable to the estate-tail, will become absolute(*x*). In strictness, the lessee has originally, with a view to the legal effect of his lease, a term of years subject only to a collateral quality, under which it may expire by the determination of the estate out of which it is derived. It is inaccurate to treat these terms as being for a given number of years, if the tenant in tail shall so long live, and the heirs of his body shall so long continue. Terms granted by tenant in tail should be created, and assigned as absolute interests, without any collateral determination : but in the co-

(*x*) Dyer, 51, b. in Marg. Bac. Abr. Leases, D.

venants for title, such exceptions should be made, or qualifications added, as will confine the warranty of title to the peculiar nature of this interest.

While mention is made of leases by tenant in tail, it will be proper to notice, that by the statute *de donis conditionalibus*, leases granted by tenant in tail for years or for lives, are (as far as they are independent of the influence of common recoveries, and also of the statutes of proclamations on fines, and the enabling statute of the 32 H. the 8th, c. 28. and powers in settlements) voidable by the issue, and not actually void. They consequently admit of affirmance by the acceptance of rent, or by any other act which recognizes the existence of the lease, after the death of tenant in tail. Such leases, however, are invariably good as against the tenant in tail himself and his alienee, and even a husband tenant by the curtesy, or wife, tenant in dower (y). A distinction also is taken between those leases of tenant in tail, which are to commence, or which by any possibility may commence, in his life, and those leases which, by the very terms of the limitation, are to commence after his death.

(y) Dyer, 46, b. 2 Bendl. 65. *Bedford's Cas. Rep.* 70. Bac. Abr. Leases, D.

Leases of the former description are voidable only, and not void: while those of the latter description are actually and originally void (z), at least as against the issue.

It is also agreed, that leases voidable by the issue in tail, cannot be avoided by his alienee, with the exception, that the books treat the alienee as having the right to avoid a lease, which is to commence in possession, after the completion of the title of the alienee.

The books (a) also seem to say, that a lease to commence on a *future day*, and which would be voidable by the issue in tail, may be avoided by the alienee of tenant in tail, who is the grantor, when the lease is to commence in possession, after the title of the alliance is complete: but this is a position not easily reconcileable with first principles.

It is also worthy of observation, that if tenant for life lease for an hundred years absolutely, and the estate of the lessee is confirmed by the reversioner, the lessee will have an absolute instead of a determinable interest (b); his lease will be derived out of the estate for life, while that estate continues, and will be binding on the estate of the rever-

(z) Dyer, 279, pl. 7. *Griffin v. Stanhope*, Cro. J. 455. *Machel v. Clarke*, 2 Lord Raym. 778.

(a) Bacon's Abr. Leases, D.

(b) Co. Litt. 45. a.

sioner, whenever that estate commences in possession. When it is propounded, that derivative terms will cease with the determination of the estate out of which they are derived, this must be understood of their absolute determination, by effluxion of time or a collateral determination, as in the instance of a lease to *A.* for ninety-nine years, *if he shall so long live*; or by a condition annexed by the parties to the original estate; for neither the merger, surrender, or forfeiture of the particular estate, will induce the determination of the estate granted by the underlease. It is also worthy of observation, that when the particular estate is defeated by merger, surrender or forfeiture, the privity of estate between the lessor and the lessee in the underlease, is determined; and the remedy for rents and for breaches of covenant, no longer continues (c). The lessor in the underlease cannot have these remedies, because they were annexed to a reversion which no longer continues; and they cannot be claimed by the person who had the reversion expectant on the estate of the lessor in the underlease, because there is no privity of estate between this reversioner and the original lessee. These observations must be understood as relevant to the common law. In particular instances

(c) *Webb v. Russell*, 3 Term Rep. 393. Moore Rep. 94.

of renewals, the inconvenience has been remedied by the legislature(*d*).

Leases are of two sorts :

1st, Leases which depend on the ownership of the lessor ;

2dly, Leases which depend, either in the whole or in part, on a power residing in that person ; and leases of the latter description owe their effect, as far as respects those in remainder, &c. to the power under which they are created ; and they are created by means of powers in acts of parliament, conveyances to uses, or authorities in wills.

In general, leases derived under powers are good as against the party himself, his heirs or issue, and those in remainder or reversion ; but a power may be penned specially, and may make a lease under the power, binding on the party, and his heirs or issue, without affecting those in reversion or remainder. An instance occurs, under the enabling statute of the 32d H. 8th. c. 28. Leases made in pursuance of that statute, by tenant in tail, are good as against the tenant in tail and his issue, and are void as against those in reversion or remainder(*e*), supposing them to be different persons from the tenant in tail. And therefore a lease granted by tenant in tail, in pursuance of the provisions

(*d*) 4 Geo. 2. c. 28, s. 6. (*e*) Co. Litt. 44. a.

of the statute of 32d H. 8th, c. 28, will, as against those in reversion or remainder, determine when the estate-tail shall determine; and the estate-tail, unless enlarged into a fee-simple by a common recovery, will determine on the failure of the issue inheritable to the estate-tail.

Leases are again distinguished into leases which *pass an interest*, and leases which operate by *estoppel*. Leases of the former description are supplied from the ownership of the lessor. Those of the latter description are made by persons who have *no interest* at the time, at least no *vested* estate, but are to operate on their ownership, when they shall acquire the same.

Thus, if an *heir-apparent*, or a person having a *contingent remainder*, or an interest under an *executory devise*, or who has no title whatever at the time, makes a lease by *indenture*, or by a fine *sur concessit*, and afterwards an estate vests in him, this indenture, or fine, will operate by way of estoppel, to entitle the lessee to hold the lands for the term granted to him; and his estoppel, when it becomes efficient, and can operate on the interest, will be fed by the interest; and the lease will be deemed as a lease derived out of an actual ownership(f). And there are many cases,

(f) *Weale and Lower*, Pollexf. 54. Co. Litt. 47, 277, a. Bac. Abr. Leases, O.

in which it is prudent to make such a demise, to the intent that the same may bind the title by way of estoppel, though it cannot operate as a lease of a present interest.

It has frequently occurred, that, in cases of this sort, a fine *sur conuzance de droit come ceo*, &c. or other fine, importing a grant of the fee, and not a fine *sur concessit* for years, has been levied. This practice is pregnant with mischief, because the operation of a fine, purporting to grant the fee, will be to extinguish the right to any future estate, instead of binding the title to that estate by estoppel (g).

The late case of *Roe ex dem. Bulkley v. Archbishop of York* (h), calls for some observation. According to the established doctrine, every lease for years which cannot operate upon the ownership, may, if made by indenture, or by fine *sur concessit* for years, operate by way of estoppel; and no lease that can operate by way of passing *an interest*, will operate by way of estoppel (i): and whoever has a term for years, or even an estate for life, and accepts a new lease, incompatible with the interest granted by the former lease, abandons the interest un-

(g) *Buckler's Case*, 2 Co. 55.
Weale v. Lower, Pollexf. 54.

(h) 6 East, 86.
(i) Co. Litt. 47. b.

der the former lease (*k*) ; and this acceptance of the new lease is a virtual surrender of the former lease, and is called a *surrender in law*. In the cited case, there was a lessee and reversioner, and the reversioner had an estate for life, with a power of leasing under certain restrictions : and the reversioner, " for and in consideration of the surrender of a former lease, and by virtue " and in execution of the power therein referred to, or any other power in the lessor, " or in anywise enabling her," demised to the lessee for a term of years, at a yearly rent, &c. And the lessee accepted this lease : and it was decided, that the acceptance of this new lease was not a virtual surrender of the former lease. The alleged ground is, that the lease was intended to be made by virtue only of the power ; and as the power was not pursued, the new lease did not work an extinguishment of the interest of the former lease : for the parties have declared, most clearly and unequivocally, that the new lease should take effect by authority of the power. The argument supposed, that the second lease being void under the power would operate under the interest of the lessor ; so that the acceptance of this new lease was a virtual surrender of the term under

(*k*) *Ire's Case*, 5 Co. 11.

the former lease: but Lord Ellenborough observed, "whether or not this lease will operate, as between the parties, by estoppel, is not material for the present purpose to inquire. It is sufficient to warrant us in deciding for the defendant, if it did not pass an interest, which we are of opinion it did not." It is to be lamented that the question of estoppel was suffered by the court to remain in doubt. From all the text books, it will appear, that no lease can operate by way of estoppel, when it may operate by way of interest, although it cannot operate to the full extent of the intention of the parties. If the second lease had any operation whatever, it must have been to pass an estate for the term of years determinable on the death of the tenant for life. This lease must have been derived out of her estate, and not have been binding on her merely as an estoppel, since there was an estate to support the lease to this extent; and to admit that the second lease operated in any manner, either by way of interest, or by way of estoppel, is to bring the case within the authorities which decide, that by the acceptance of a new lease, there is a virtual surrender of the former lease. An estoppel, it is well known, must be mutual, binding on both parties, or on neither: and the lessee could never contend, contrary to the estoppel, that no term passed to him by the second

lease. The estoppel precludes his right to deny the operation of the second lease. To support the case of *Roe ex dem. Bulkeley v. Archbishop of York*, it seems necessary to conclude, that the case turns on the point, that the lease was intended to operate under the power; that as it could not operate under the power, it did not operate on the estate; and for that reason the second lease was absolutely void, and had no operation whatever by way of estoppel, or as passing an interest. In practice, it is prudent to follow this case, with the precaution, whenever a renewal is taken by virtue of a power, to add a few negative words, to show that the new lease is to operate by virtue of the power only, and not of the estate, or interest of the party by whom the power is to be exercised. Such clause may be to this effect:—

“ *And the said* . . . *by virtue and in*
 “ *pursuance and exercise of the power or au-*
 “ *thority in that behalf contained in the will*
 “ *of the said* . . . *and as far as he is*
 “ *authorized or enabled by that power, but no*
 “ *further or in any other manner, doth direct,*
 “ *limit, and appoint;”* or “ *doth by way of*
 “ *demise or lease, direct, limit, and appoint,”*
 &c.

These words will clearly exclude all intention that the instrument shall operate as a demise under the ownership or estate of

the lessor, and will enable the court to decide on the construction of the lease, solely with reference to the power, independent of the question, whether the lease does not necessarily operate by virtue of the estate, since it cannot operate by virtue of the power. A clause in this form would enable the court, with great propriety, and in strict conformity to the decided cases, to determine, that as the lease cannot operate according to the language and intention of the parties, it shall have no operation whatever; since if it were to operate in any other manner, such operation would be contrary to the intention. These observations also show, that the case of *Roe ex dem. Bulkley v. Archbishop of York*, is free from all difficulty, if the decision turned solely on the ground, that the lease was intended to be a lease by virtue of the power, and that it neither had, or was intended to have, any operation by way of estoppel, or in point of interest, so that it was originally and in the first instance merely and simply void.

When an estate for years is derived out of several interests, as a lease by *A.* and *B.* when *A.* is tenant for life, and *B.* has the remainder in fee, it is originally the lease of *A.* and the confirmation of *B.* (1). On the

(1) *Treport's Case*, 6 Co. 14.

death of *A.* it will be deemed in law the lease of *B.* and the confirmation of *A.* So, if a lease for years be granted by *A.* tenant for life, this lease in its creation is determinable on the death of tenant for life; but a confirmation of this lease by the owner of the inheritance, at any subsequent period, and during the life of *A.* will render the estate absolute, and it will continue as well after the death, as during the life of *A.*; but during the life of *A.* the privity will be between *A.* and the lessee only. The relation of *landlord and tenant*, and of *tenant and reversioner*, will subsist between them alone; but on the death of *A.* the tenant will become the lessee of the person by whom the confirmation is granted: hence the distinction, that during the life of *A.* the estate of the lessee cannot be enlarged, by a grant from any other person than *A.*: but, after the death of *A.* the estate of the tenant may be enlarged by a release from the person by whom his term was confirmed, or any person who is the owner of the estate of the confirming party.

A lease for years is merely a contract for the possession, and may be *in esse* for a time, and cease for a time; therefore, if tenant in tail make a lease for years, and die, leaving a widow who is dowable, and issue in tail, the lease will be good against the issue, though avoided by the wife; or if avoided

by the issue, it will be good against the wife (*m*).

In the *Earl of Bedford's case* (*n*), " Sir Thomas Wyatt, by indenture, demised the manor of Austine for twenty-six years, rendering 13*l.* rent to the said Sir Thomas and his heirs ; and afterwards Sir Thomas died, and all this was found by office. And Sir Thomas Wyatt was his son and heir male, of full age, by which the king had *primer* seisin of the land itself, and for his interest did avoid the lease ; and afterwards Sir Thomas, the son, sued livery, and accepted of the rent of Austine, and afterwards committed high treason, for which he was attainted. And in that case it was adjudged, that forasmuch as the king had avoided the lease, but as to his *primer* seisin, that after livery made, it is in the election and power of the issue in tail, by acceptance of the rent, to affirm the lease, because the lease was avoided by the king but for part of the term. So if tenant in tail takes a wife, and makes a lease for thirty or forty, &c. years, rendering rent, which is avoidable by the issue in tail, and dies, and afterwards the wife recovers her dower, in that case the wife shall avoid the lease : and yet, if she dies within the term, the

(*m*) *Bedford's Case*, 7 Co. 72. (*n*) 7 Co. 72.

“issue in tail at his election may either
“affirm or disaffirm the lease. And it was
“said, if tenant in tail makes a lease for
“thirty or forty years, rendering rent, which
“is avoidable by the issue in tail, and after-
“wards tenant in tail dies without issue, his
“wife with child with a son, by which the
“donor enters, and as to him avoids the
“lease : and afterwards the son is born : the
“lessee re-enters, the son at his full age may,
“by acceptance of the rent, affirm the lease :
“for the lease was never avoided absolutely,
“nor *simpliciter*, but *secundum quid* ; and
“upon the matter *ex post facto*, was defeated
“but for a time.”

To these observations it is to be added,
that a lease avoided by the issue in tail, is
void as against each successive issue in tail ;
and a lease avoided by the *successor* of a cor-
porate body, under any of the disabling sta-
tutes, will be void as against the successor for
the time being ; so that there is a material
difference between the avoidance by a person
in respect of a *partial interest* or *particular*
estate, and by the owner of the entire interest,
as the issue in tail.

Again, Leases are distinguished into—

1st, Leases of the possession ;

2dly, Leases of the reversion ;

3dly, Leases by way of reversionary in-
terest.

Leases of the first description, are to confer a present right of present enjoyment, at least by the intention of the parties; but a lease at the common law, of lands in possession, passes no estate till entry. In the mean time, the lessee has no term or estate; he has merely an *interesse termini* (o). This *interesse termini* may be assigned (p), even without deed (q), or released, but it cannot be surrendered, nor does it, while executory, admit of enlargement by release (r). Though, at the common law, a lessee had no term until actual entry, a bargainee of the use for years, has an actual estate, on the execution of the bargain and sale; and this is the reason, as will appear in a subsequent chapter, that the estate of a bargainee for years may be enlarged by release, without an actual entry (s). For the same reason it may be surrendered.

2dly, Leases of *the reversion*, are leases granted by a person who has a reversion, and they pass a portion of that reversion as a *vested interest*. They confer a right to the reserved rent and services, and create the relation of *landlord and tenant* between the

(o) Co. Litt. 46. b. 270. a.

(p) Co. Litt. 47. b. 338. b.

(q) Co. Litt. 85. a. Plow.
Com. 150.

(r) Co. Litt. 270. a.

(s) *Barker v. Keate*, 2 Mod.
249; *Mallorie's Ca.* 5 Co. 113.

first lessee and the second lessee. Such leases of a part of the reversion cannot be granted without deed; nor, while attornment was a ceremony in the law of tenures, could any estate have vested in the second lessee, without attornment by the person whose attornment the law had required, to the validity of grants of the reversion.

3dly, A *Reversionary Lease*, is a lease to commence on a future day, or on an event, and is to operate in the mean time by way or in the nature of an *interesse termini*. It may be granted with or without deed; and it will be good, though granted without deed, by a person who has merely a reversion or remainder; but when granted without deed, it never can confer a right to the possession, till the possession is *vacant*; nor can it confer a right to the rents or services in the mean time. On this subject, some further observations will be found in a subsequent part of this chapter.

Of the means by which Leases may be created.

Leases, with the exception of leases at will, are either for *years* or for *life*, and the assurance must be adapted to the nature of the interest to be created.

To leases for a life or lives, unless they are created under a power, or are of a reversion

or remainder, or a thing lying in grant, there must be livery of seisin, or a lease and release, which are equivalent to livery.

But leases for lives under powers may be created in the mode prescribed by the power, without any livery of seisin, &c. (t) and it is more proper that they should be created without livery of seisin than with it; and leases for lives of things lying in grant, or of a reversion, or remainder, cannot be created without deed.

Leases for years may be created either by deed or without deed, according to the circumstances of the case, with the exception, that leases of *incorporeal* hereditaments must universally be created by deed. Even of *tithes*, separate and apart from the *rectory*, there cannot be a lease for years without deed: but a contract for *retainer* of tithes by the owner may be good without deed. This contract is to be used as an agreement, and not as a grant or lease; though the tithes, separately, cannot be leased without deed; a *rectory* may be so leased, and the tithes may pass as parcel of the rectory (u).

Leases made in pursuance of a power, must pursue the circumstances required by the power; and for that reason they must

(t) *Wilson v. Garrett*, 2 Lev. 149; 1 Vent. 291. *Reynoldson v. Blake*, 1 Lord Raym. 193.

(u) *Shep. Touch.* 269. 229.

be made by deed, by indenture, or the like, so as to conform to the requisites of the power.

Leases depending for effect on the ownership of the lessor, must be made either by deed or without deed, according to the circumstances of his estate; for if the lessor has an estate in reversion, the lease cannot be granted *of the reversion* without deed. So if he has an *incorporeal* hereditament, he cannot grant a lease of such hereditament without deed; nor can a term, when created in an incorporeal hereditament, be transferred without deed (*x*).

But if he has an estate in possession in corporeal hereditaments, the lease may be good without deed, though, in practice, it is usual, and certainly advisable, to make the lease by deed, and to have the deed indented, that it may operate as an estoppel. At the common law, a person so circumstanced might have made a lease merely by parol, without writing. Now, by the statute of frauds, and perjuries (*y*), a writing is required to the validity of all leases, except those for a term not exceeding three years, and on which two thirds of the yearly value shall be reserved.

The books all agree that a person who

(*x*) Co. Litt. 85 (a).

(*y*) 29 Car 2. c. 3.

has a reversion or remainder in corporeal hereditaments, may make a lease for years, to operate by way of *interesse termini*, without deed: but such lease without deed cannot operate as a grant of the immediate estate, as a portion of the reversion or remainder. Great difficulty is experienced in collecting from the books, whether this *interesse termini* shall commence in possession, as an actual estate, as soon as the possession shall fall to the lessor by surrender, forfeiture, or other means, or shall operate only on the possession from the period when, by effluxion of time, the lessor is to have the possession by reason of the actual and not the accidental determination of the prior estates. In Bacon's Abr. chap. Leases, under the letter N. an able discussion of this point will be found, with various distinctions between the effect of grants made, 1st, by *parol*, or; which is the same in effect for this purpose, *by mere writing*:— 2dly, by deed poll;— 3dly, by indenture. The conclusion to which Chief Baron Gilbert seems to arrive is, that a term granted by *parol*, by a person who has merely a remainder or reversion expectant on a term for years, will be void for such part of the time as is comprised in the former lease, and will be good for the remainder of the time. It is admitted, that the doctrine does not apply to those in-

stances, in which the prior estate is *for life*, and it follows any other estate of freehold. It is evident, also, that the Chief Baron is not perfectly consistent in all the parts of this chapter. In one instance, he treats the lease by parol as to take effect in possession, "upon the determination of the first lease, "when or which way soever that happens;" while, in a subsequent passage, he considers the second lease as incapable of effect, if the period of the first lease runs out by effluxion of time; and it is to be lamented, that the doctrine of the Chief Baron is derived from the arguments of counsel in the case of *Bracebridge v. Clowse* (z), and not from any decision. The utmost extent of authority to be found among the cited cases, is the opinion of Mr. Justice Gawdy (a), that "so much of the second lease as comprises the same term as was included in the former lease, is "void in its inception." Perhaps it may not be too much to say, that this point deserves further consideration. It is difficult to understand why this lease cannot bind the possession in the hands of a lessor, from the time the possession shall fall to him.

The great object in all leases, either for life or for years, is to fix, with certainty, the duration of interest. In leases for lives, a

(z) Plowd. 121.

(a) Cro. Eliz. 160.

life or lives, or some event connected with a life or lives, must be the measure of the interest. Even these limitations admit of a great variety, of which the following are examples :

To *A.* for his life ;

To *A.* for the life of *B.*;

To *A.* for the lives of *B.* and *C.*;

To *A.* for the lives of himself, *B.* and *C.* ;

To *A.* for the joint lives of himself and *B.* ;

To *A.* and *B.* or to several persons for their joint lives.

To *A.* and *B.* for their lives ;

To *A.* for her widowhood.

To *A.* while she shall remain sole ;

To *A.* while she shall remain sole and chaste ;

To *A.* till he shall return from Rome ;

To *A.* till he, or some other person, shall pay a sum of money ;

To *A.* while he shall remain a justice of the peace ;

To *A.* till he shall be promoted to a benefice in the church ;

To *A.* and *B.* while they shall be resident in Norfolk, or shall be justices of the peace, for the county of Norfolk.

In short, the form of the limitation may be varied with any circumstance connected with the life of man. This subject is fully dis-

cussed in the Essay on Estates, chap. Estates for Life. In some instances, the estate will be merely for life, notwithstanding the addition of a limitation to the heirs; as in the instance of a grant to *A.* and his heirs, for the lives of himself, and of *A.* and *B.*; or for any other period which necessarily must determine with a life or lives. In such instances, the heirs are named merely as special occupants, and the limitation to them does not create an inheritance. The reason is obvious: the interest is bounded and circumscribed by a life or lives. But in other instances, the addition of the word "heirs" will make an estate of inheritance, which, without these words, would have been merely a freehold. Thus a grant to *A.* till his marriage, or till his return from Rome, will be an estate for his life, determinable on the event which is expressed: but a grant to him and his heirs till his marriage, or till his return from Rome, will give an estate of inheritance determinable on that event; and in case the event shall fail, this inheritance will become an absolute fee-simple. The leading rules for discriminating an estate merely of freehold, from an estate of inheritance, when the grant contains a limitation to the heirs, will be found in that chapter of the Essay on Estates, to which reference has lately been made. A point of some dif-

ficulty (b) is, whether an estate for life must be measured by a life or lives actually in being at the time of the grant. It is now settled, that a gift by way of remainder or executory devise, or springing use, to a person who is unborn, for his life, is good. The only restriction is, that when a person not *in esse* nor in *ventre sa mere*, at the death of the testator, or at the date of the deed, is made tenant for life, no limitation in favour of his issue as purchasers, will be good within the rule against perpetuities. There is one point in which there does not appear to be any decision, *viz.* whether though a grant made to A. for his life, with remainder to his first son for life, would be good; a grant to A. for his life, and the life of his first son then unborn, will be supported according to the intention of the parties. A passage in Hawkins' Abridgment (c) of Coke upon Littleton, seems to question the validity of a grant in this form, *quoad* the life of the unborn son. His language is—"by a gift
" to A. and his heirs, his heir can take no-
" thing: not an inheritance, because there is
" no possibility of its continuing for ever;
" not a freehold descendible, because such
" must continue during lives *in esse* only, and
" no man can create a new estate."

(b) Essay on Estates, p. 408.

(c) p. 12.

In principle, no objection seems to exist against such grant. The law of perpetuities cannot be adduced as an objection against a limitation in this form. Should it be said, that *A.* may die before the son is born, especially when the child is to be from a stranger, and not of *A.* himself, it may be readily admitted, that the death of *A.* will occasion the determination of the estate (*d*), and that the estate will not revive on the subsequent birth of a child. But on the policy of the law, even against perpetuities, it may be easily inferred that there cannot be an estate for the period of successive lives not *in esse*; as, a gift to *A.* for his life, remainder to his first son for life, remainder to the first son of that son for his life, and so on in succession (*e*). Perhaps the same rule may be extended to a grant to *A.* for his life, and for the life of his first-born son, and for the life of the first son of that son, &c. &c.; and yet it is very difficult to find, in the books of the common law, any authority which denies the validity of such limitation; except the limitation be void, upon the ground, that a lease for life must necessarily be for the life of a person or persons in being at the date of the lease.

(*d*) *Poole v. Nedham*, Yelv. stone, 1 P. W. 332. 5 East, 149. p. 198.

(*e*) *Humberstone v. Humber-*

Some suspicion seems to have been entertained on this point by the practitioners of more ancient times, when the rules of the common law were more simple and better understood than they are at the present day. They seem to have accomplished by indirect means, that which they could not have accomplished with certainty and confidence by more direct limitation. Instead of limiting an estate for the life of *A.* and his first-born son, &c. they were wont to limit an estate for years, if *A.* and his first-born son, &c. should so long continue. Also, though a limitation to *A.* and his heirs for lives, to be born in succession, may not be good, no doubt is to be entertained of the validity of a limitation to *A.* and his executors for a term of years, if he and the heirs of his body, or he and his heirs of a given description, shall so long continue. In deeds at the common law, it is necessary that a grant of an estate of freehold should be made to commence immediately; in other words, the freehold must not be put *in abeyance*. This rule extends to grants of lands in possession, and to grants of the reversion of lands, and also to grants of incorporeal hereditaments already created (*f*). Grants of incorporeal hereditaments, on their creation *de novo*, are

(*f*) *Duckler's Case*, 2 Co. 55. Essay on Est. c. Freehold.

not within the rule. This subject, with the reasons on which it depends, is fully discussed in the chapter on Freeholds, in the Essay on Estates; nor does the rule extend to limitations of use, either in bargains and sales, covenants to stand seised, or uses in conveyances, nor to limitations in wills. The use may be limited to commence at a day to come, or upon an event, and it will be good by way of future or springing use. So a limitation in a will may be good, though it is to commence from a future time, or upon an event. In each of these instances, all that the law requires is, that the time at, or the event upon, which the estate is to vest an interest, shall be fixed so as to happen within that period which is prescribed by the rule against perpetuities. The following examples will illustrate this doctrine: a doctrine which deserves the most minute attention, since, from its defeating the intention, it is more likely to surprize into a mistake, those who are not intimately acquainted with the rules of law governing real property.

1st, A lease to A. for a life or lives, to commence from next Michaelmas, is void; being a lease to commence in future. This case supposes livery to be made before Michaelmas day. Livery after the day, if made in person, or if made by an attorney with sufficient authority, will support the lease; for livery to hold from a day that is

past, is, in point of law, livery of the immediate freehold, and free from the objection of being a grant to commence *in future*: in other words, to place the freehold in abeyance. Like law of a grant by deed when the deed is delivered before the day. Evidence is admissible to prove that the deed was delivered after the day.

2dly, A bargain and sale, or covenant to stand seised to uses, will be free from objection, although it is to give an estate of freehold, to commence at a future day, or upon an event; as a bargain and sale to *A.* and his heirs, To have and to hold to *A.* and his heirs from and after Michaelmas day now next ensuing. So in a conveyance to uses, an use may be limited to *A.* and his heirs, from and after a given day, or a particular event. In all these instances, *A.* has a future use, to be executed into estate, from and after the appointed period or designated event. In the mean time, the use will result to the bargainor, covenantor, or grantor, and the *cestui que use* will have merely an inchoate interest, and not an estate. The like limitation may be made by will, and be good under the learning of *executory devises*.

And these different instruments admit of a great variety of such limitations; circumscribed by no other rule, than that the limitation must be within the boundary pre-

scribed by the doctrine against perpetuities. It will also be collected from the chapter of Freehold, in the Essay on Estates, that this rule against the *abeyance* of the freehold, is applicable only to the first or particular estate. Remainders expectant on an estate of freehold, may be good by way of remainder, although they are limited to commence from a future time, or upon an event. Such limitations are the subject of the doctrine of contingent remainders; and provision is made against the abeyance of the freehold, by the rule of law that requires these limitations to give a vested interest during the particular estate, or, at latest, in the instant when that estate determines. Nor is this rule extended to limitations, which though sounding futurely, may give a present and immediate interest, as in the instance afforded in *Badger v. Lloyd* (g), *Weale v. Lower* (h), and *Lady Lanesborough v. Fox* (i).

In regard to leases for years, the text books seem to propound the rule, that every lease for years shall have a certain commencement and a certain continuance. It is essential, that the time of duration of every lease for years shall be measured by fixed periods, as by years, months, weeks, days, hours, minutes, or the like:

(g) Lord Raym. 523.

(i) Cas. T. Talb. 262.

(h) Pollexf. 54.

and it cannot be measured by indefinite periods of time, as so many years as *A.* shall live, or till an event shall happen, or the like, except the event has reference to a certain period of time, as till *A.* shall attain his age of twenty-one years, or till 100*l.* shall be paid out of a rent affording an income of 10*l.* a year (*k*); and though it may be referred to *A.* to give certainty to the duration of the lease, by naming the term, he must name the term during the lives of the lessor and lessee (*l*).

But a lease for years may have a *collateral determination*; and that may be done indirectly, which cannot be accomplished by more direct means. For example: a lease for so many years as *A. S.* shall live, will not be good as a lease for years; but a lease to *A.* for 100 or any other number of years, if he shall so long live, will be a good lease with a collateral determination. In the former instance, no certain limited time is fixed for the duration of the lease, while, in the latter instance, certain limits are prescribed for the duration of the interest; and the term, though determinable on the death of *A.* has this limitation only by way of collateral determination. When it is said, that *terminus annorum certus debet esse, et deter-*

(*k*) *Bishop of Bath's case*, (1) 1 Co. 155. 6 Co. 35.
6 Rep. 35.

minatus (m); or in the language of Lord Coke, "regularly in every lease for years, "the term must have a certain beginning "and a certain end" (n), this is to be understood in its legal and technical sense. The only circumstance required in limitations of terms for years is, that a precise time shall be fixed for the continuance of the terms; so that when the commencement of the term is ascertained, the period of determination, by effluxion of time, may be known with certainty. In the first place a term may be limited to commence from the date of the deed, or from a future period, or upon an event, or upon such one of several events as shall first happen, or, as the intention shall dictate, from such one of several events as shall last happen. The general forms for the commencement of a lease are, from the date; from the execution or the making of the deed; from the 25th day of March now next, or now last past, or some other fixed day now next ensuing, or which is past; from the death of A. or the death of A. without having been married, or from any other event; from the forfeiture, expiration, or other sooner determination of a subsisting term. When the

(m) Bracton, lib. 2. c. 9.

34, 35. Co. Litt. 45, b.

(n) *Bishop of Bath's case*, 6 Co.

term is limited from a day that is past, it commences in *title*, only from the execution of the deed. The title cannot have retrospect. The words of reference to a time past, are merely for the purpose of *computation*, as one of the means of measuring the duration of the interest. No right to the profits for a time past can be conferred by a lease in this or any other form. In case the lands are held under a prior lease, so that the lease in question grants the immediate reversion, the rent from Lady-day past may belong to the second lessee; but his right to this rent will depend, not on the period fixed for the computation of his interest, but on the rule of law, which considers the rent to belong to the person who is the owner of the reversion on the rent-day; and treats each portion of the rent, whether it becomes due yearly, half-yearly, or quarterly, as one entire demand, belonging to the person who is the reversioner on the rent-day. The continuance of the term must be measured by years, months, weeks, days, or some other period equally reducible to a certainty with years, months, weeks, days, &c.; so that the extreme bounds of the duration of the interest may be ascertained at latest, immediately after the term commences in interest. At the same time, however, that the law requires the extreme boundary to be fixed, it admits of *conditions*

to defeat, and *collateral determinations* to put an end to, these terms in the mean time, before they have filled the measure of their continuance. On these points, the more useful information, with the examples and their illustrations, will be found in the Essay on Estates, in the chapter on Estates for Years, and still more fully in Bacon's Abr. chapter Leases. It may be useful to state a few distinctions, by way of contrast between leases for years and leases for lives. Such contrasts have the evident advantage of enabling the student to form correct opinions of the law, upon points most material to be understood.

First, by the rules of the common law, an estate of freehold (except an estate of freehold in a thing created *de novo*, and in such thing only on its first creation) cannot be limited to commence at a future time, or upon an event ; but a term for years may be limited to commence from a future time, or upon an event.

Secondly, An estate of freehold cannot be created without livery of seisin, of lands in possession, or without a grant, by deed, of lands in reversion ; but a term for years may be created without livery, and, except in particular cases, without deed.

Thirdly, An estate of freehold once created, cannot be transferred without livery of seisin ; or, being of incorporeal heredita-

ments, or of a reversion or remainder, without a grant by deed. A term for years, being merely a chattel, may, unless it is an incorporeal hereditament in its nature, as a rent, &c. and although it is a term for years in reversion or remainder, be granted from person to person without deed; but a term for years in incorporeal hereditaments, as rents, cannot, from the nature of the subject, be transferred without deed. The language of Lord Coke^(o) on this point is, “ Note a diversity between an original chattel, of a thing that properly lyeth in grant, and a chattel derived out of a freehold, of any thing that lyeth in grant. For example; if a man make a lease for years of a villein, this cannot be done without deed; neither can the lessee assign it over without deed, because it is derived out of a freehold that lyeth in grant: but the wardship of the body is an original chattel during the minority derived out of no freehold; and therefore, as the law createth it without deed, so it may be assigned over without deed.

“ A corporation aggregate of many cannot make a lease for years without deed, in respect to the quality of the incorporation; but their lessee may assign it over *without deed* ^(p).

(o) Co. Litt. 85, a.

(p) Co. Litt. 85, a.

“ If an advowson be holden by knights’-
 “ service, and the tenant dieth, his heir
 “ being within age, the lord cannot grant
 “ the wardship of the advowson without
 “ deed, because it is derived out of an in-
 “ heritance that lyeth in grant, and passeth
 “ not by livery; for *jus præsentandi* is incor-
 “ poreal (q).”

Fourthly, At the common law, an estate of freehold cannot be limited to vest and re-vest at different times, so as to be *in esse* for a time, and suspended for a time. This rule, however, is confined to things *in esse*, and not to incorporeal hereditaments, as rents, when the stipulation is annexed to them on their creation, by the terms of the original grant (r). In their nature, terms for years may cease for a time, and be *in esse* for a time (s). From the same rule it follows, that an estate of freehold cannot be confirmed for a time, and suffered to remain in a defective state for the residue of the time (t): but a title under a term for years may be confirmed for a portion of the time, and left in *statu quo* for the remainder of the time (u). On this subject Lord Coke has the following passages :

(q) Co. Litt. 85, a.

7 Rep. 70. Litt. 46, a.

(r) Essay on Est. ch. Freehold.

(t) Litt. 519, 520. Co. Litt. 297, a.

(s) Earl of Bedford's Case,

(u) Co. Litt. 297, a.

“ A confirmation can make no fraction
 “ of any estate to extend but to part of
 “ the estate only (x).” This observation must
 be confined to estates which are of freehold
 tenure.

“ If the parson makes a lease for a *hundred*
 “ years, the patron and the ordinary
 “ may confirm *fifty* of the years ; for they
 “ have an interest, and may charge in time
 “ of vacation. And so if a disseisor makes
 “ a lease for a hundred years, the disseisee
 “ may confirm *parcel of those years*, but then
 “ it must be *by apt words* ; for he must not
 “ confirm the lease or demise, or the estate
 “ of the lessee, for then the addition for
 “ parcel of the term should be repugnant,
 “ when the whole was confirmed before ;
 “ but the confirmation must be of the land
 “ for part of the term. So may the con-
 “ firmation be of part of the land ; as, if it
 “ be a lease of forty acres, he may confirm
 “ twenty, &c. So if tenant for life make
 “ a lease for a hundred years, the *lessor*,”
 [namely the original lessor,] “ may confirm
 “ either for *part of the term*, or for part of
 “ the land. But an estate of freehold can-
 “ not be confirmed for part of the estate,
 “ for that estate is entire, and not several
 “ as years be (y).”

But the land may be confirmed for part of

(x) Co. Litt. 296, a.

(y) Co. Litt. 297, a.

the term: thus a term for life may give a confirmation for the time of his estate. So there may be a confirmation to a rent for life, without confirming the remainder expectant on that estate, Litt. § 521. So one of two estates in the same person may be confirmed without confirming the other estate.

It was a refined distinction, that a confirmation of the *term eo nomine*, or of the *estate*, precluded any qualification, aiming at a confirmation for a particular period. The old books, as is evident from the passage cited out of *Co. Litt.* treated the term as comprising all the estate; and the words which express a particular time for the duration of the confirmation, as inconsistent. In modern times, this distinction seems to have been exploded. See *Plowden v. Cartwright* (z). On the same ground it was formerly held, that a grant of lands and *all the estate*, or of all the estate in the lands, would render an *habendum* for a *particular time* repugnant. This point was overruled in a late case, by which it is decided, that an *habendum* for a particular time will be operative, and the deed will receive the construction, that the lands, and the estate in the lands, are granted for the time expressed in the *habendum* (a).

Fifthly, An estate of freehold in lands cannot be defeazanced except by a condition

(z) 1 Burr. 282.

(a) *Earl of Derby v. Taylor*, 1 East. 502.

contained in the deed granting the lands, or in a deed executed at the same time, and forming part of the same transaction; but a term of years may be defeazanced by a deed executed at any time after the creation of the term.

Sixthly, An estate of freehold is entire, and cannot, by the rules of the common law, be avoided, by condition, for part of the same. It must be wholly avoided, or not at all; while a term for years, which is merely a contract for the possession, may, by defeazance, be avoided, or suspended for a time, and left in force for the residue of the time.

It is also to be noted, that limitations by way of use and by executory devise, may defeat part of an estate of freehold previously limited.

Lastly, An estate of freehold granted by lease at the common law, cannot, by means of a condition, be made to cease, *ipso facto*, by the operation of the condition: but a condition annexed to a lease for years, that the lease shall, upon a particular event, be void, will actually defeat the estate. It follows, that an estate of freehold to which such condition is annexed, will, after the condition is broken, remain as a subsisting estate, till avoided by entry or claim (b), and

(b) Co. Litt. 214, b.

consequently may be confirmed or enlarged : while a term of years thus defeated by the condition, will, *ipso facto*, be avoided, and consequently cannot be enlarged, nor be confirmed by express words, or acceptance of rent(c) ; since a confirmation must be of an estate which is voidable or defeasible only, and not of an estate which is void. It is also to be observed, that under the learning of uses and executory devises, an estate of freehold may, by a conditional limitation, operating as a future, or springing, or shifting use, or by an executory devise, be made to cease, *ipso facto*, without entry or claim.

After these preliminary observations, it will be necessary only to consider the *formal* parts of a lease, and the cautions to be observed in preparing instruments of this description.

The parts of a lease are,

1st, Its style ;

2dly, The parties ;

3dly, The consideration ;

4thly, The grant ;

5thly, The parcels ;

6thly, The exception ;

7thly, The habendum ;

8thly, The reservation ;

9thly, The conditions ; and,

10thly, The covenants.

1st, Leases are made by *indenture*, or by *deed poll*.—Indentures begin with the words, This Indenture, &c.; while in deeds poll the exordium is, “ Know all Men by these Presents, that I, *A. B.* in consideration of, &c. “ have, &c. ;” or, *To all persons to whom these presents shall come, A. B. sends greeting, &c. Know ye that, &c.*

2dly, In indentures of lease, as in other deeds, the grantors—namely, lessors—on the one part, and the grantees—that is, the lessees—on the other part, should be named as the parties; and care should be taken that the lessors are competent to make a lease, either in right of some *estate*, or by virtue of some *power*.

Sometimes, as when a lease is made pursuant to a power, which requires consent, or is made by a trustee who has no right to lease without the concurrence of his *cestui que trust*, the person whose consent is so required, or the *cestui que trust*, should be also named as a party, that he may express such consent, or give his concurrence. * And when different persons having different interests, are the lessors, the number of parties will be increased. As often as the person who is to be the immediate lessor, has merely a particular estate, or a doubtful or defeasible title, there should, if the intention requires it, be the concurrence of those persons, who may

give stability and confirmation to the lease. When *A.* has the fee under a *defeasible* title, a lease granted by him to *B.* will be subject to be avoided by the person in whom the title resides, unless that person confirms the lease. And if *A.* is tenant for life, with remainder to *B.* in fee, and a lease is made by *A.* alone, such lease, unless warranted by a power, will determine on the death of *A.* That the lease may be good against *B.* and his heirs, he should join in the lease. And, as already noticed, a lease made by *A.*, tenant for life, with the confirmation of *B.* who has the remainder or reversion in fee (*d*), will, during the life of *A.* be construed as the lease of *A.* and the confirmation of *B.*; and after the death of *A.* it will be construed as the lease of *B.* and the confirmation of *A.*; consequently, the rent reserved by the lease will belong to the person who is, for the time being, in the intendment of law, the leasing party (*e*). But when *A.* has the fee under a defeasible title, which resides in *B.* and the lease is made by *A.* and confirmed by *B.*, *A.* will at all times be deemed the lessor, and *B.* be deemed the confirming party; and the rent reserved by the lease, will, during the term, belong to the lessor and his representatives. It will be obvious in this

(*d*) *Treport's Case*, 6 Rep. 16.

(*e*) *Ibid.*

place, that a confirmation will be available, though proceeding from a person who cannot make a valid lease in point of interest. That a man may lease in point of interest, he must be seised, or have a *vested estate*; but the confirmation of a lease will be binding, although it proceeds from a person who has merely a *right* or *title*, and not an estate.— Under these circumstances, the confirmation operates by way of *release of right*; and the law favours releases, and confirmations which partake of the same nature.

3dly, A *consideration* is not of the essence of a lease, except in *bargains and sales*, to operate under the statute of uses; and even in assurances of that nature, the reservation of a rent will be a sufficient consideration (f).

In general, a consideration will not vitiate a lease, except it is made under a power, and that power restrains the lessor from taking any fine, premium, or foregift. When such restriction is imposed on the power, then to receive any consideration will defeat the lease; and consequently, to express a consideration, is to make the lease void on the face of it, as far as depends on the power.

In all other cases, when a lease is made for a consideration, the consideration should

(f) *Barker v. Keate*, 2 Mod. 249.

be expressed in such terms as will correctly describe it. Of course, when the consideration is a valuable one, there should be a receipt for the same. To these observations there is an exception in practice: bishops and other ecclesiastical corporations, by whom renewals are granted at the ancient rent, seldom permit the consideration of the renewal to appear on the face of their leases.

4thly, In demises at the common law, the operative words should be, "demise, grant, "and to farm let (g);" and in leases to operate through the medium of the statute of uses, the operative words should, in strict propriety, though this is not absolutely necessary, be "*bargain and sell* (h)."

In demises for terms of years, by way of mortgage, the operative words generally used are, "grant, bargain, sell, and demise;" and when the lease is made under a power, there should be a reference to the power, and the words of the power, as "direct, "limit, and appoint," or the like, should be used. To the words of appointment may be added, the words of the common law demise; and they may be introduced by a clause to this effect, *viz.* "And by way of "*further assurance*, the said hath

(g) Co. Litt. 45. a.

(h) Butler's Co. Litt. note to p. 271, b.

“granted,” &c. And in this, as in other deeds, the grantor and grantee should be named in this part of the assurance; and when there are several grantors, the clause “Have and each of them hath granted,” &c. should be inserted; and when the lease is made in pursuance of a power given to two persons jointly, it is more correct to use joint words of appointment, without any words to give a distributive construction to the acts of the parties. Also, when any consent is required to the execution of a power of leasing, or trustees lease with the consent of the *cestui que trust*, such consent should be expressed in this part of the lease. And as often as any particular mode of execution and attestation is required, a reference to such mode of execution and attestation should be made in this part of the deed, and the deed should have a corresponding attestation. The attestation is essential; while the expression in the deed is formal only. The observations on this subject will be found more fully detailed in the chapter on Appointments; for all leases made in pursuance and exercise of a power of leasing, contained in a conveyance or devise to uses, are, in strictness and propriety, appointments by way of lease, and not leases or demises. The term “demise” or lease,” is, in propriety, confined to leases

to operate under the rules of the common law.

A question frequently arises, on informal instruments, whether the instrument operates as a lease, or as a contract for a lease; in other words, whether it confers a legal and perfect title, or merely a right to have a specific performance of the contract, by a lease to be granted in performance of the agreement.

In *Baxter v. Browne* (i), an agreement was with all convenient speed to grant a lease; and they (the intended lessors) did thereby set and let to him All that, &c. To hold for twenty-one years from Candlemas Day then next, at the rent of 290*l.* per annum, payable half-yearly, with a proviso, that the lease should be void on non-payment of rent, alienation, &c. and that such lease should contain usual covenants on the part of the lessors and lessee, and certain special covenants therein mentioned, in one of which the words *this demise* occurred; and it was held that this was clearly a good lease *in presenti*, with an agreement to execute a more formal and perfect lease *in futuro*. The court observed, that the operative words, *let and set*, were in the present tense; that a reference was made

(i) 2 Bl. Rep. 973.

to this demise. It is observable, that there had been fourteen years possession under this instrument, and the lessors of the plaintiff had accepted rent. Under such circumstances, the court observed, if the words of the lease could import an immediate legal demise, the court would support it as such.

In *Goodtitle ex dem. Estwick v. Way* (k); Lord Abingdon entered into an agreement with Way, which contained these words: "The said Earl of Abingdon doth hereby agree to let, and the said Richard Way agrees to rent and take for the term of seven, fourteen, or twenty-one years, in case the said Earl shall so long live, at and for the rent of 1,400*l.* a year, to be paid half yearly (the said Earl to pay or allow all manner of tithes and taxes, both ordinary and extraordinary,) all his estate, &c. at Rycot. It is agreed the said Richard Way shall enter upon all the said premises immediately, but not commence payment of the rent until Lady-day next. It is further agreed, that leases with the usual covenants shall be made and executed by the parties on or before Michaelmas next." And the court were all of opinion, that this was not a lease. They said the case of *Sturgeon v. Painter*, (l) was in point. They also ob-

(k) 1 Term. Rep. 735.

(l) Noy, 128.

served, that in the present case there was an express stipulation, that leases should be drawn before Michaelmas; therefore it plainly was not the intention of the parties that this agreement should operate as a lease, but only that it should give the defendant a right to immediate possession till a lease could be drawn.

In *Doe on dem. of Coore v. Clare (m)*, T. Tidd, who was entitled to certain copyhold messuages in reversion after an estate for life, agreed, by an instrument in writing under his hand and seal, upon an agreement stamp, that in case he should be seised of or entitled unto the said messuage, &c. on the death of Mary Slathorn, he would, immediately on her death, demise and let the same to the said T. Clare, on the terms and conditions thereafter mentioned; and therefore the said T. Tidd did agree to demise and let unto the said T. Clare, all, &c. To hold to the said Clare from and immediately after the death of the tenant for life, for the full and whole term of twenty-one years, at a yearly rent; the first payment to be made on the first quarterly day after the death of the tenant for life: and, after several covenants on the part of Clare, Tidd covenanted, that after the death of Mary Slathorn, and his be-

(m) 2 Term Rep. 739. *Lady Montague's Case*, Cro. Ja. 301.

coming entitled to the premises, he would *procure license to let* the said premises, and also covenanted, that Clare should peaceably enjoy for the said term of twenty-one years; and it was held that this agreement did not amount to a lease. The court relied particularly on two circumstances: 1st. That if the agreement were held to be a lease, a forfeiture would be incurred, which was contrary to the intention of the parties, as appeared by the agreement to procure a license: 2dly, That the stamp was conformable to the nature of an agreement for a lease, and not adapted to an absolute lease.

The result of all the cases appears to be, that the instrument will operate either as an actual lease, or as an agreement for a lease, according to the intention of the parties, as that intention can be collected from the entire instrument.

In general, an express agreement to execute a formal lease at a future day, is evidence of an intention, that the instrument shall operate as a mere executory agreement, and not as an actual lease. But when there are words of *actual demise*, in the present tense, these words will amount to an immediate lease, though they are accompanied with other words, containing an agreement for the execution of a formal lease at a future day. Under these circumstances, the words of the agreement do not control the

operation of the words of **express demise**. They cannot explain words in which there is no ambiguity. But when, instead of the words "*doth demise*," &c. the words "*doth agree to demise*," are used, these words may be explained and qualified by the context of the instrument.

5thly, The parcels should be fully described; at least should be described with sufficient certainty; and such exceptions should be introduced as are necessary to accomplish the intention of the parties.

In demises for long terms of years, the parcels should, in general, be taken from the last purchase deed. But in farming leases, building leases, &c. a new description is generally adopted; and in particular in farming leases, the description may be very concise, since reference to the last occupier, &c. seems the only distinguishing circumstance which is material, in addition to the name and contents of the farm, &c. Thus the description may be, "All that
" called _____, situate in the parish of
" _____, now or late in the tenure or oc-
" cupation of _____, and containing by
" estimation _____ or thereabouts."

In appointments by way of demise, *under powers*, the parcels are generally introduced in the recitals, and granted with reference to the description in the recital. Circumstances, however, render even a departure

from this form convenient; and, generally speaking, it is desirable to have the description of the parcels in the operative part of the instrument.

In all demises, the general words should be introduced, and in demises or appointments for long terms of years, the clause of *all the reversion*, is usually inserted. The clause of "all the estate" should in all leases be omitted as informal.

In farming leases, &c. the clause of "all the reversion" is also to be omitted.

But the addition of the clause of "all the estate," though improper, is no longer so obnoxious as it was formerly considered. The only instance, in which this clause can militate against the intention of the parties, is when it is introduced into an instrument, intended to be a lease by a person who has a term for years. There are cases in the books, which would lead to the inference, that the clause "all the estate" would pass all the interest, and consequently the whole term, of the grantor, and that a subsequent *habendum*, introduced with a view of creating a particular estate, would be repugnant and rejected. It is now decided (*n*), and with great reason, that the express limitation in the *habendum* will qualify the words of grant in the parcels, and, on the context, the in-

(*n*) *Earl of Derby v. Taylor*, East, 502.

strument will import, and be construed, to be, a demise or grant of the lands, and of all the estate therein, for the particular term; and thus the intention of the parties will be established, and the deed will operate as a demise of a portion of the estate, and not as a grant of the entire interest.

6thly, When the intention requires it, an exception should be added. The rules of law to be observed, in regard to exceptions, will be found in the chapter on Releases.

7thly, In this species of assurance also, an *habendum* is generally introduced. As in other instruments, so in this species of assurance, it is a *formal* and not a *necessary* part of the deed.

And all the observations made on the *habendum* in releases, are equally applicable to the *habendum* in a lease, except in the particulars to be collected from the observations which follow.

Frequently, it is required by powers, that the lease shall be made in possession, and not in reversion, or by way of future interest. Therefore, in executing powers, this stipulation must be observed.

So in common law, leases for lives, which pass an estate of freehold, the freehold must be granted as a present and vested interest, and not be placed in *abeyance*. But to leases for lives, made under powers, ~~unless~~

the contrary is required by the power, it is no objection that the term is granted by way of future interest, since it may operate as a springing or future use.

With the exceptions which have been noticed, leases for years may be granted to take effect, either from the execution of the deed, or from a future day, or any event. In the limitation of a term for years, the continuance of the term must be definitively marked, so that the time of its continuance, or rather the precise period of its determination, may be ascertained, at latest, from the period of its commencement in interest.

On this subject, all the observations necessary to be attended to, will be found in the *Essay on Estates*, chap. Years, and in the preceding part of this chapter.

Sometimes, to leases for years a collateral determination is annexed. This collateral determination should be expressed in the most clear and precise terms.

The greater difficulty is experienced to express the contingency, when the estate for years is to continue in one alternative till several events shall happen, and in another alternative till one event shall happen.—Cases of this sort sometimes require nice and critical attention. The contingency should be so fully and clearly expressed, that the construction may not admit of any ambi-

guity, or be doubtful in the interpretation. Every case of this sort must depend on its own peculiar circumstances. The form may be to this effect, *viz.*

“For ninety-nine years, if *A.* shall so
“long live, and *B.* his son shall be a
“minor; or which shall first happen
“until *B.* shall be married.”

Sometimes the contingency may defer the operation of the collateral limitation, till the last of several events shall happen; as, “to
“*A.* for ninety-nine years, if *B.* shall so long
“live, or if there shall be issue of his body,
“or, which shall last happen, if there shall
“be a default on the part of *C.* to pay to *D.*
“his executors, administrators, or assigns,
“the sum of 1000*l.*”

These forms may be varied, so as to be increased to a number almost indefinite. Every case must depend on its own circumstances, and the intention of the parties. The more material point is to use the words “and” and “or,” as conjunctives or disjunctives in their strict grammatical application; and to render their purport so clear, certain, fixed, and determined, that no question may be fairly raised on the sense in which these words are used. Expressions to this or the like effect are best adapted to remove all ground for doubt, *viz.*

“If *A.* shall die unmarried, and also
“without issue;” or

"If he shall die under the age of
"twenty-one years, or if he shall die
"after that age without having been
"married."

In all cases to add the words "also" or
"likewise" after the word "and," will prove
that word to be used as a conjunctive; and
to repeat the word "if," or the words "in
"case," after the word "or," will leave no
doubt of its being used as a disjunctive.

These observations will also be found
equally applicable in penning covenants,
conditions, and limitations by way of exe-
cutory devise.

A lease for *years*, if *A. and B. shall so
long live*, will determine on the death of
either of these persons (*n*); and unless such
is the intention, the clause should be ex-
pressed in these words: "If *A. and B. or
"either of them shall so long live*;" so as to
keep the term on foot until the death of the
survivor of these persons.

A distinction of the same sort, but with a
different conclusion, is applied to leases for
lives. Thus a lease for the *lives of A. and B.*
is a lease during the lives of them, and the
survivor of them (*o*). But a lease during
such time as *A. and B. shall be justices of*

(*) Brudnel's Case, 5 Co. 9.

(o) Ibid.

the peace, is a lease only during such time as both of them shall continue in that office (*p*). It is apprehended, a lease until *A.* and *B.* shall return from Rome, would be a lease until the return of both of them; because the return of one of them does not satisfy the words of the limitation. In short, all cases of this sort depend on the intention expressed by the words of limitation. Though the resolutions in *Brudnel's case* are considered as sound law, the reason assigned for these resolutions is not quite satisfactory.

8thly, In most leases, a rent is reserved.

The general rules are,

1st, It cannot be reserved to a stranger; and,

2dly, It may be reserved *to the heir, &c.* without being reserved to the ancestor, &c.; but the heir takes it as incident to the reversion; and, for that reason, it may be released or disposed of by the ancestor (*q*).

The rent ought to be reserved *during the term*, unless particular circumstances require that it should be reserved only for a part of the term; for it may be reserved to commence from, and after a given time or a given event, or to cease before the end of

(*p*) *Brudnel's Case*, 5 Co. 9.

(*q*) *Bacon's Abr. Rent.* Co. Litt. 313. b. & note. *Oates v. Frith*, Hob. 130.

the term. With this qualification, the sure way is to reserve the rent during the term, and then it is incident to the reversion. And when the rent is reserved during the term, it will belong to the heir, executor, or assignee, who for the time being shall be owner of the reversion, notwithstanding the omission of words of reservation to the heirs (*r*).

But unless the rent is reserved generally, without saying to whom (*s*), or is reserved *during the term*, it cannot go to the heirs or executors unless they are named; for it will determine on the death of the lessor (*t*). And though the rent is reserved to the *lessor and* his assigns, yet, as the assignee comes in the place of the lessor, it will determine, as to the assignee, on the death of the lessor (*u*).

So if a man, who is seised in fee, makes a lease, and reserves a rent to himself and *his executors* generally, without saying *during the term* (*x*), the executors cannot have this rent, though they are named; because they are not the representatives of the lessor *quoad* the reversion, to which this rent is an-

(*r*) *Sacheverel v. Frogate*, 2 Sand. 367. Vent. 162. Surry v. Brown, Latch. 99, 100. Bac. Abr. Rent.

(*s*) Co. Litt. 47. 2.

(*t*) Co. Litt. 47. 2 Roll. Abr. 450.

(*u*) Co. Litt. 47. *Wooton v. Edwin*, 12 Rep. 36.

(*x*) *Richmond v. Butcher*, 12 Co. 36, is over-ruled.

nexed, and the heirs cannot have the rent, because they are not named (y).

Also, and for the same reason, *mutatis mutandis*, if a man, who has a term for years, make an underlease, reserving rent to himself and *his heirs*, without limiting it to be during the term, neither the heirs or executors can have this rent; but as has been already noticed (z), a reservation *during the term* will cure any defect in naming the representatives, and will also supply the omission to name them (a).

When different rents are to be reserved for different periods, the commencement and continuance of each rent should be clearly marked.

As apparently, an exception to the general rule, that a rent cannot be reserved to a stranger, it may be observed, that if a man who has a power under a settlement to uses, reserves the rent to him and *his heirs*, this rent will be incident to the reversion, and belong to the persons who from time to time shall be seised of the reversion subject to this lease (b).

So also if he reserves the rent to himself, and every person to whom the reversion and

(y) Co. Litt. 47. 2 Roll. Abr. 450.

(z) Vent. 161.

(a) Drake v. Mundy, Cro. Car. 207.

(b) Whitelock's Case, 8 Rep. 69.

inheritance of the land shall belong during the term (c).

Rents reserved upon leases made under powers in settlements, are generally reserved to the lessor and his assigns, and to the person or persons to whom for the time being, and from time to time, the reversion of the premises immediately expectant on the said term, shall belong.

The advice of Lord Coke is, to reserve the rent during the term (d).

And in leases under powers, the rent should be reserved in such other mode, as is required by the circumstances of the power.

For instance: the rent must be reserved half yearly or quarterly, if it is so required by the power. And in leases made by husband and wife, tenants in tail, and ecclesiastical persons, under the different enabling statutes, the reservation should be in strict compliance with the words of the different acts of parliament (e).

In this place it will be proper to observe, that when tenant in tail makes a lease, reserving rent to him and heirs, this rent will be incident to the reversion, and belong to the issue in tail, if the reversion shall descend

(c) Whitelock's Case, 8 Rep. 71.

(d) 8 Rep. 71.

(e) See Bac. Abr. ch. Leases.

to them, though they are not the general heirs (*f*).

And if a person, seised *ex parte maternâ*, or in any other special manner, makes a lease, reserving a rent to him and his heirs, this rent will also be incident to the reversion, and belong to the heir inheritable to the estate, descending to him.

The like law applies to reservations of rent for lands in *Borough English* and *Gavelkind*.

But if a man seised in fee, makes a grant in fee, reserving a rent to him and his heirs, in this case, as there is no reversion, the rent will be considered as a new acquisition. And although the grantor was seised in fee *ex parte maternâ*, this rent will be descendible to his heirs generally, and consequently his paternal heirs will be preferred (*g*).

In Co. Litt. 169, b, however, it is observed, "If two coparceners, by deed indented, alien both their parts to another in fee, rendering to them two and their heirs a rent out of the land, they are not *joint tenants* of this rent, but they shall have the rent in course of coparcenary, because their right in the land, out of which the rent was reserved, was in coparcenary."—For this passage, no authority is cited by Lord Coke; and the authority to which re-

(*f*) Hard. 89. Vent. 163.

(*g*) Co. Litt. 12.

ference is made by one of the editors, is inapplicable; and if the position cited from p. 12, of the same book be law, as it seems to be, the doctrine of Lord Coke in p. 169 is irreconcilable.

From Finch's Law, octavo edition, p. 9, there may be collected the distinction, that if two coparceners make a lease, reserving rent, they shall have this rent as coparceners, as they have the reversion; but if they grant the *reversion, excepting the rent*, so that the rent is severed from the reversion, then they shall be joint tenants of the rent. *A fortiori* in the example given by Lord Coke, the coparceners, since they retained no reversion, ought to be deemed joint tenants of the rent. The instance put by Finch, has the singularity, of an interest, which was several, becoming joint, and it is an anomaly, and the doctrine advanced in this passage is questionable.

In regard to rents reserved by deed, or without deed, it is to be observed, that an *indenture* may operate, as to the rent, by way of estoppel; so that if two joint tenants lease by indenture, reserving rent *to one* of them, this person alone shall have the rent; though if the lease had been by *deed poll*, or writing only, the rent would have been incident to the reversion, and consequently belonged to both joint tenants (*h*).

(*h*) Co. Litt. 47. 2 R. Abr. 447.

9thly, In leases, also, a condition is inserted, when it is required by the intention of the parties. For instance: in mortgages there is a condition to express the right of redemption; but this right is more generally expressed, in modern deeds, by an agreement, rather than a condition.

In leases, the condition should be adapted to the nature of the lease, and therefore different conditions should be added, according to the intention of the parties, and the purport of the lease.

And in all these leases it is usual to add a condition, that the lease shall be *void*, or that there shall be a *right of re-entry*, if the rent shall be in arrear for a given time, and not paid when lawfully demanded.

When the clause is penned in these terms, the rent must be demanded on the land at the end of the limited time: and if that time is suffered to elapse without a lawful demand, no advantage can be taken of the default in payment of the rent within the time limited. As this is contrary to the intention of the parties, the clause should run to this effect:—"That if the said rent shall
" be in arrear for the space of twenty-one
" days after any one of the days herein-
" before appointed for payment of the same,
" and the same rent shall be lawfully de-
" manded upon, or at any time after, the
" expiration of the said twenty-one days,

"and not paid when demanded, 'Then,' &c.

The advantages of this clause are, that it gives the lessor the right of re-entry, without imposing on him the necessity of enforcing that right by an entry on a particular day.

In leases of this sort also, a condition is inserted, to enable the lessor to re-enter, in case of breach or nonperformance of all, any, or either of the covenants, articles, clauses, and agreements, contained in the lease, on the part of the lessee, his executors, administrators, or assigns.

This is a very harsh clause against a tenant. It subjects him to a forfeiture by a breach of his covenant in any particular, however trivial; and therefore, on the part of the lessee it is always of importance to have an enumeration of those acts which are to be the ground of forfeiture.

Lessees of houses and farms are also restrained, by a covenant with a condition superadded, or by a condition from assigning or underletting; and farming leases are generally made determinable on the bankruptcy or insolvency of the tenant, or in suffering the leases to be taken in execution.

These restrictions are of great advantage to the lessor, and there is no objection to them when they are confined to the lessee

himself. But the condition is also extended to the executors and administrators of the lessee; and, in reference to them, the condition is extremely inconvenient, since it cannot be expected that the executors, &c. should occupy, &c.

These conditions are, on many occasions, made the instrument of great oppression. In short, they enable the lessor to defeat the lease, and thus gain all the advantage of improvements, unless the executors will hold, &c. The only mode of avoiding their operation is, to name certain persons, who may contract to sell, and appoint the purchaser when ascertained the *executor, quoad* the term. This is suggested as an experiment, to be tried when particular circumstances of hardship may render it expedient.

It is settled, that a condition in a lease which restrains assignment, does not extend to an underlease (i). When the restraint is on an assignment only, the executor may derive advantage, by making an underlease. And in reason, the condition imposed on lessees ought not to be extended beyond the restraint of assignment.

These conditions were originally introduced for the purpose of preventing the te-

(i) *Cruso v. Bugby*, Wils. Rep. 234.

nant, for the time being, from discharging himself from the liability to pay the rent; but when the point of law is fully investigated, the reason of this practice can never be applied to any one, except the lessee himself. And, at the common law, even the lessee could not discharge himself from the contract to pay the rent, and perform the covenants, without the consent of the lessor, since the lessee remains tenant to the lessor, until the lessor accepts the assignee as his tenant.

Hence the caution with which some gentlemen give their receipts for rent, expressing it to be received of the tenant by the hands of the assignee or occupier.

But when a lease is made with covenants to pay the rent, the lessee and his representatives will continue liable, under the covenant for payment of the rent, notwithstanding an assignment, and acceptance of the assignee as tenant. Therefore the caution is applied to many instances in which it is not necessary.

From a similar caution, lessors sometimes object to consent to an assignment, when the condition requires the assignment to be with consent.

Their apprehension is, that by consenting to the assignment, the original lessee would be discharged from the payment of the rent, &c. Such, indeed, would be the conse-

quence as far as regards the right to the rent under the privity of contract: but when there are covenants in the lease, on the part of the lessee, to pay the rent, &c. the lessee will continue liable, notwithstanding an assignment. Indeed, so far from being injured by the assignment, in point of remedy for the rent, when there is a covenant to pay the rent, the lessor, &c. may resort to his distress on the land, or may maintain an action against the assignee as tenant, or against the lessee or his representatives, or the assignee, upon the covenant; so that his securities are increased instead of being diminished.

Other usual covenants in leases, are those which are calculated to avoid the lease, on the bankruptcy of the lessee or assignee, on which a commission of bankrupt shall issue (*k*), or his permitting his goods to be taken in execution (*l*). Such conditions are good. It has even been held, that though an involuntary alienation, by reason of an execution (*m*), is not a breach of a condition in restraint of assignment, yet an execution taken out, on a warrant of attorney confessed fraudulently, and for the very purpose of having the term taken in execution,

(*k*) *Doe v. Galliers*, 2 Term Rep. 133, b.

(*l*) *Doe v. Carter*, 8 Term Rep. 57, 300.

(*m*) *Doe v. Carter*, 8 Term Rep. 57.

is an assignment within the true construction of this condition (n).

A lease to A. and his assigns, with a condition that he shall not assign, makes the condition repugnant; but there is no repugnancy in a condition that A. shall not assign to a particular person; or that he shall not assign within a limited time; or that he shall not assign without previous consent. Whenever consent is to dispense with the operation of the condition, it is prudent that the condition should stipulate, that the consent shall be in writing, that parol evidence may not be adduced, or mere conversation made the foundation of the licence to assign.

Conditions in leases are of two sorts, *viz.*

1st, Those which give a right of entry :

2dly, Those which make a lease *ipso facto* void.

This depends on the language in which the condition is penned.

When the condition is merely to re-enter, the conclusion of the condition is in this form:—"Then and in that case," or "then and in any or either of the said cases, it shall or may be lawful to and for the said and his heirs or assigns, [or, as the case shall require, his executors, ad-

(n) *Doc v. Carter*, 8 Term Rep. 300.

“ministrators, or assigns,] into or upon
 “the said hereby demised premises, or any
 “part thereof, in the name of the whole of
 “the same, to re-enter, and the same pre-
 “mises to have again and retain, as in
 “his or their first and former estate, any
 “thing, &c.”

And when the lease is to be absolutely void, then the conclusion of the condition is—“Then and in that case, and from thence-
 “forth, the said term shall cease and be
 “void, to all intents and purposes what-
 “soever.”

The material difference between a condition to re-enter, and a condition that the term shall be void, is, that in the former case the term will continue till advantage is taken of the condition; and in the latter case, as far as relates to terms for years, the term will actually cease by breach of the condition (o).

Another difference arising from the same cause is, that, in the former case, the forfeiture by breach of the condition may be waved or dispensed with (p), and in the latter case, it cannot; notwithstanding the rule; “that *Quicvis potest renunciare juri pro se introducto* (q).” (See note at the beginning of this vol. page xxxii.)

(o) Co. Litt. 214, b.

(q) 2 Inst. 183.

(p) Dumport's Case, 4 Co.

However it is clear, that *at the common law* an estate of freehold cannot, by the operation of a mere condition, cease without entry or claim, in whatever form the condition is penned.

But though an estate of freehold cannot be defeated by a condition, without an actual entry or claim, yet by a conditional limitation in a conveyance to uses, or in a will, one estate may be made, *ipso facto*, to cease, and another to commence. For the general rules respecting conditions, the language in which they are to be penned, to whom they are to be reserved, &c. and in what cases they may operate, see Shep. Touch. Com. Dig. and Bac. & Vin. Abr. chap. Conditions.

It now seems the more prevailing opinion, founded on *Dumport's case*, that if a condition consists of several branches ; as for non-payment of rent, non-performance of covenants, &c. ; a dispensation with any part of the condition, will be a dispensation with the condition entirely.

Even *Dumport's case* turns on a principle which savours of great refinement. Independent of that case, it would have seemed, that an assignment *with* licence, according to the condition, could never have been construed a breach of the condition ; and that there could not have been a dispensation,

with a condition not broken. The law, however, is settled differently.

But the rule that the condition is entire, and that a dispensation with any branch of it, is a dispensation with every part of the condition, is not open to objection.

To prevent the application of *Dumport's case*, contrary to the intention of the parties, the condition may be specially penned, so as to make the right of entry depend on some act proceeding from the lessor, his heirs, or assigns, as the payment of a shilling, notice in writing, or the like.

The principle established by *Dumport's case*, renders it necessary to be particularly cautious in giving a licence to assign, and by that means dispensing with the condition. It was generally supposed, that the addition of a restriction in the licence, that the assignee should hold, subject to the payment of the rent, and the performance of the covenants and conditions contained in the original lease, was sufficient to preserve the operative force of the condition, so as to guard against future assignments. But there seems no ground whatever to rely on this restriction, as sufficient to attain the object to which it is directed. The object may be effectually accomplished by a different means. Leases for years are considered in law as mere chattel interests. They may be

defeasanced by means of a grant or condition, as well after they are created, as at the time of their creation, although an estate of freehold cannot be defeated by any condition, except a condition annexed to the estate at the time of its creation or transfer. And a condition in a transfer will avoid the conveyance rather than the estate, and will merely enable the grantor to resume the estate after breach of the condition. Such condition, to be operative in regard to a freehold lease, must be contained in the deed creating the lease, or in another deed delivered at the same time, and forming part of the same transaction, so as to fall within the principle, that *quæ incontinenti fiunt in esse videntur*.

As leases for years may be defeasanced by a condition, annexed to the term, at any time after its creation, resort should be had to the doctrine of the law respecting *Defeasances*, as the proper mode of imposing on the assignee the restriction against assigning without license, whenever it is deemed an object to adopt such restriction. A form of a deed of defeasance, adapted to this purpose, will be found in the Appendix.

These observations also lead to others, relevant to the form of conditions in mortgages. The conclusion of these conditions

is sometimes, " that the term shall cease
" and be void ;" at other times, that " the
" mortgagee, his executors, &c. shall, upon
" the request, and at the costs and charges
" of the mortgagor, his heirs or assigns, sur-
" render the messuages, &c. and the residue
" of the term therein, to the mortgagor, his
" heirs or assigns, or assign the same mes-
" suages, &c. for the residue of the term
" therein, to such person or persons, and for
" such purposes, as the mortgagor, his heirs
" or assigns, shall direct or appoint." So
in mortgages in fee, the proviso is either
" that the grant or release hereby made shall
" cease and be void, to all intents and pur-
" poses whatsoever," or " that the mortga-
" gee, his heirs, &c. shall convey to the
" mortgagor, his heirs or assigns, or to such
" person or persons, and for such uses, in-
" tents, or purposes, as he or they shall
" direct or appoint ;" and sometimes the
circumstances require that the proviso shall
be still more special.

To begin with mortgages in fee will more
fully illustrate the reason by which these diffe-
rent provisions are dictated.

The object of the proviso of redemption,
is, in all cases, to express that there is to
exist a right of redemption. When an actual
and efficient condition is expressed, there is
the two-fold use of reserving the right of

redemption, and of defeating the estate of the mortgagee, in case the money shall be paid according to the condition. The leading rule is, that no one, except the person by whom the conveyance is made, or his representatives, viz. his heirs as to real estates, or his executors as to chattel interests, can take advantage of a condition. The rule is pithily expressed in these terms—"a condition cannot be reserved to a stranger." The operation of the condition must be, to restore the seisin or estate of the person, from whom it moved, or to his heir, in case of real estate, or to his executor or administrator in the case of chattel interests. When *A.* is seised in fee, and conveys to *B.* in fee, by way of mortgage, the obvious intention of the parties is, that, upon payment of the money at the appointed time, the estate of *B.* shall cease, and revert in *A.* or his heirs. This may be accomplished by a condition, expressed in formal language; but when *A.* is seised in fee, as a mortgagee under *B.*, and *A.* and *B.* join in a transfer of that mortgage, the effect of a condition introduced into this transfer, would, if the condition operated, be to restore the estate to *A.* the former mortgagee, instead of re-vesting it in *B.* the person in whom it is intended that the estate shall vest, when the mortgage debt is discharged. Great inconvenience might arise from having the estate

revested in the former mortgagee. The same inconvenience might arise when A. is a trustee instead of being a mortgagee; and though it seldom happens that a mortgage condition is performed, so as to become operative and produce this inconvenience, yet, with reference to the possible inconvenience and technical propriety, there has been introduced into practice, an agreement that the mortgagee shall convey to the beneficial owner, his heirs or assigns, or as he or they shall appoint, instead of a condition, which, if it operated, would produce the inconvenience that has been noticed. Similar reasons operate in dictating the form of the proviso for redemption in mortgages, by way of demise, creating terms for years, and in assignments by the beneficial owner, as distinguished from assignments made by the beneficial owner with the concurrence of a former mortgagee or a trustee. In the present state of mortgaged transactions, the probability, and almost certainty, is, that the money will not be paid at the day; and the form of the proviso for redemption, is in this particular, not so important as it would be if the parties intended that this clause should have a full and precise operation. The more material point is, that the form of the proviso displays the skill of the person by whom it is prepared, and tends rather to show the application of the law, than to

produce any utility expected to arise from a strict adherence to form. The following observations will be added, as relevant to the point under consideration.

1st, In mortgages by way of demise for years, from *A.* to *B.* or from *A.* and his trustee to *B.* and also mortgages made by a limitation of use, on a conveyance to uses, the proviso should be, that the term shall cease, and be void.

2dly, This is also the proper conclusion, when *A.* has a term for years, and assigns to *B.* by way of mortgage; or

3dly, When *A.* seised in fee, conveys to *B.* in fee, by way of mortgage.

The same form also might with strict propriety, in point of law, be used when *A.* is seised in fee, and demises to *B.* for years by way of mortgage, and *A.* and *B.* join in an assignment and confirmation of the term to *C.* by way of mortgage, for securing money payable by *A.*; for in this instance the condition will operate by way of defeasance; and its effect, should the condition be performed, will be to extinguish the term for the benefit of *A.* as having the reversion: for the very ground on which the condition may operate in favour of *A.* is, that *A.* has the reversion, so that the defeasance partakes, in some degree, of the nature of a surrender. While inchoate, it operates as a contract for a surrender, and when it

operates, it produces the effect of an actual surrender. It may be safely assumed, that a defeasance cannot give effect to the intention of the parties, except it is between persons, who stand in the relation of lord and tenant, or tenant and reversioner. In all other cases, the general form of the proviso for redemption, should stipulate that the mortgagee shall convey or assign to the person entitled to the redemption, his heirs, &c. or as he or they shall direct. These clauses, indeed, are become general in practice, and have almost excluded conditions in their proper form; and it is more correct, that these agreements for redemption should omit all words which may be construed as conditions, so that they may be clearly and unquestionably agreements for redemption, and not conditions, either in operation or in form.

Lastly, In all leases, there should be covenants, on the part of the lessee, adapted to the nature of the lease and the agreement of the parties: in particular there should be a covenant for payment of rent.

In farming leases there should be covenants, prescribing the mode of managing the farm.

In building leases and repairing leases there should be covenants to build, repair, &c. and for insurance against fire.

And in leases of houses for occupation,

there should be covenants respecting the repairs, fixtures, painting, &c.

In short, the covenants in every lease must vary with the intention of the parties, and the agreement between them; and for all these purposes the best guides are good forms, to be used by way of precedent.

Contrary to the generally received opinion, no instrument requires more care than a lease. The covenants should be penned with great attention to the language, so as to keep all the parts consistent, and express the precise intention of the parties.

All covenants should be by the covenantor, for himself, *his heirs, executors*, administrators and assigns. The assignee will be bound by all covenants which concern the land. In short, he will be bound though not named.

And the covenants should be with the lessee, and his heirs and assigns, if the heirs are to be special occupants of a freehold lease; and, in all other cases, with the lessee, his executors, administrators and assigns. And care should always be taken to use these relative terms according to the nature of the interest which is granted, and the persons who are to be bound by the covenants, or to have the advantage of them.

The general points to be observed in covenants are,

1st, The subject, *viz.* the thing to be done or omitted;

2dly, By whom, or to whom ;

3dly, At whose request, and at whose costs and charges ;

4thly, The time ;

5thly, The place ;

6thly, The circumstances or conditions under which the covenants are to be performed.

And in preparing the covenants, these different points should always be kept in view, or at least as many of them as are applicable to the case.

*Of the Theory of the Law as it applies to the
Conveyance by Lease and Release.*

As this is the common assurance which obtains in general practice, and as settlements and conveyances in fee and for lives to purchasers and mortgagees, are, for the most part, made by lease and release, almost to the exclusion of every other species of assurance, it is important that every part of the learning connected with this subject, should be fully understood ; and it will be convenient to trace,

1st, The origin of the conveyance and the principles on which it depends.

2dly, The parts.

3dly, Who may be the releasor, and

4thly, Who may be the releasee.

1. In respect of personal qualifications.

2. In respect of estate.

3. In respect of privity.

5thly, Of the form of a lease for a year.

6thly, Of the form of the release.

And in the progress of these observations it will be proper to distinguish those cases in which the lease and release are necessarily parts of the same assurance, from those in which the release may operate in some other mode.

1st, *Of the origin of this assurance.* At the common law the conveyance in general use was feoffment, and livery of seisin was the efficient part of this conveyance. The advantages of this assurance, in passing the freehold by right or by wrong (a); of binding future as well as present rights; and of restoring the seisin of those who had been disseised; gave it, in more early times, a decided preference over every other species of assurance; and as lands were rarely in lease, but the possession generally accompanied the conveyance, this was the only species of assurance which, substantively and of itself, could transfer the possession, and complete the title to an estate of freehold, or of inheritance (b). That the feoffment might operate it was essential that the feoffor should be in possession, or should have the possession at the time of making livery (c). Even at this day a feoffment will be of no avail, unless the feoffor is in possession when livery is made; or livery is made with the consent of the person who retains the possession. The tenant must even give up the possession, at least for this occasion, though it may be on the terms of *saving his own right*. It has been accordingly decided, that livery made of lands in

(a) Co. Litt. 9, a. 366, b. 367, a.

(c) Dyer, 106, 131.

(b) Litt. § 611. Co. Litt. 330, b.

the possession of a termor, with the consent of that person, is a good feoffment, and that the term may be saved by the lessee, in consequence of an express stipulation (*d*). As at the common law, a termor was considered as the bailiff (*e*) of the freeholder, rather than as having a permanent interest of his own ; and as by the rules of that law, before they were altered by the statute of Hen. VIII. (*f*) the interest of the termor might at any time have been defeated by the freeholder, the feoffment as a rightful conveyance was considered as the appropriate assurance of the person who had an estate of freehold, conferring a right to the possession. Two other cases might have occurred at the common law : 1st, the possession might have been in a tenant for years, or for life, and the intention might be to grant a reversion or remainder to a stranger ; or 2dly, there might have been an interest for years or for life, or other particular estate, and an intention to grant a further interest to the tenant of that estate. The common law provided for each of these cases. A *grant* was the proper assurance (*g*) for the conveyance of the *reversion* to a stranger. This assurance was equally proper for transferring to a stranger an estate in *remainder*, since the owner of this reversion,

(*d*) Dyer, 362. Shep. T. 202.

(*f*) 21 H. 8, c. 15.

(*e*) Essay on the Quantity of Estate, ch. *Freehold*.

(*g*) Litt. 567. Shep. T. 227,

228.

or remainder, had not any right to the possession, it was not competent to him to make feoffment of his own authority; but to preserve the notoriety in the change of the tenancy, and the certainty of the person who was, or who even might become, tenant of the freehold, the law required the solemnity of a deed by way of grant, to be perfected by *attornment*, of the person connected in privity of estate with the reversioner or remainderman (*h*). As often as the estate of the tenant himself was to be enlarged by a further grant to him, his consent to accept the grant superseded the necessity of an attornment (*i*). It also superseded the necessity of livery of seisin; for it would have been in vain to deliver the possession to a person to whom it already belonged (*k*). A deed was required even in this case (*l*), and on a close investigation of the authorities, it will be found that whenever a grant might have been made to a stranger, a release might be made to the particular tenant, under the circumstance that such person was the tenant whose attornment would give perfection to the like grant to a stranger (*m*). From these deductions it seems to follow that a release is no more than a

(*h*) Litt. 567. Co. Litt. 315, b.

(*i*) Shep. T. 227, 228.

(*j*) Litt. s. 578.

(*m*) See Litt. chap. Attorn-

(*k*) Shep. T. 206.

ment.

grant to the particular tenant, instead of being a grant to a stranger; and this assurance, in all probability, took its denomination of a release from the circumstances of its being a repetition of the act, by which the lease to the tenant was made.

It is almost needless to observe that when an instrument may operate as a grant to a stranger, it may, under the like circumstances, have the effect of a grant to a person, who already has a particular estate, although for want of that privity which is essential to its operation, by way of enlargement of the particular estate, it cannot be used, or pleaded as a release. The only difference, however, is, that the grantee must plead this assurance as a grant, instead of pleading it as a release: and before the necessity of that ceremony was superseded, attornment was essential to the validity of the deed of grant (*n*).

From the text books, and from the best authorities, it might be inferred, that no estate, except an estate giving a right to the possession, can be enlarged by release. The language of *Littleton* (*o*) is,—“Also if a man letteth his land to another for term of years; if the lessor release to the lessee all his right, &c.; before that the lessee had

(*n*) Co. Litt. 309, a. Shep. T. 253. (*o*) S. 459.

“ entered into the same land, by force of
 “ the same lease, such release is void, for
 “ that the lessee had not *possession* in the
 “ land, at the time of the release made, but
 “ only a right to have the same land, by
 “ force of the lease; but if the lessee enter
 “ into the land, and hath possession of it, by
 “ force of the said lease, then such release
 “ made to him, by the *feoffor* (*p*) or his heir,
 “ is sufficient to him by reason of the privity,
 “ which, by force of the lease, is between
 “ them, &c.” The commentary of Lord Coke
 (*q*) on this passage shows that “ Before entry
 “ the lessee hath only an *interesse termini*,
 “ and interest of a term, and no *possession*,
 “ and therefore a release which enures by way
 “ of enlarging an estate, cannot work without
 “ a possession; for before possession there is
 “ no reversion.” And *Blackstone* in his Com-
 mentaries, 2 Vol. 339, treating of this assurance
 observes, it is thus contrived, “ A lease or
 “ rather a bargain and sale, upon some *pecu-*
 “ *niary* (*r*) consideration, for one year, is made
 “ by the tenant of the freehold, to the lessee
 “ or bargainee; now this without any inrol-
 “ ment, makes the bargainor stand seised to
 “ the use of the bargainee, and vests in the
 “ bargainee, the use of the term, for a year,

(*p*) Should be lessor.
 (*q*) 270, a.

(*r*) Should be valuable, see
infra, and 2 Inst. 671.

“ and then the statute immediately annexes
 “ the possession. He therefore, being thus
 “ in possession, is capable of receiving a
 “ release of the freehold, and reversion,
 “ which, we have seen before, must be made
 “ to a tenant *in possession*: and accordingly
 “ the next day a release is granted to him,
 “ and so a conveyance by lease and release
 “ is said to amount to a feoffment.”

In another place the learned commentator treats of the necessity of an *estate in possession* as the ground work of a release: This is not very accurate, though this proposition is less objectionable than the former (s). In this passage he is taking a view of the effect of a common-law lease and release of lands held for an estate in possession.

By these expressions of his predecessor, Mr. Woodeson has been led into some difficulty, as is evident from a passage in his 2d vol. of the Vinerian Lectures (t). He observes, “ Sir Wm. Blackstone hints at a doubt formerly entertained concerning this mode of conveyancing. This objection was, that “ there ought to be an actual entry by the “ lessee, under the prior indenture,” and concludes, “ But this appears to be a very “ groundless scrupulosity; and to oppugn “ the direct sense and general construction “ of the statute. Perhaps a more solid

(s) 2 Black. Com. 324.

(t) p. 302.

“ difficulty arises when we come to consider
 “ how a lease and release can be available
 “ under the statute of uses, where a *reversion*
 “ or *remainder* is to be conveyed. For how
 “ can the vendor bargain and sell the *present*
 “ *possession* which he is not himself entitled to
 “ invade? or how can the law supply the
 “ *actual entry* of the lessee, when such entry
 “ would be wrongful and illegal?”

In Sheppard's Touchstone (u), and in Sheppard's Abr. (v) a passage nearly to the same import is found, but it contains an antidote to the doctrine, by admitting that an estate in *reversion* in deed, may be enlarged.

In these several passages, except the passage from Woodeson, the word *possession* is to be understood as applicable to a *vested estate* giving a present or future right of enjoyment. The phrase has been borrowed from the statute of uses, as distinguishing those uses which became legal estates, and conferred vested interests, by means of that statute. In short, the several writers have kept too closely to the modern practice of a lease and release, as parts of the same assurance; instead of opening the principles and learning on this subject from the rules of the common law. That these expressions tend to confound is sufficiently obvious from the observation of Mr. Woodeson, and from the difficulty he

(u) Shep. T. 321.

(v) Shep. Abr. Title Release, 157, 158.

has experienced in reconciling, with principle, the practice, as applied to conveyances by release of *reversions* and *remainders*. If a gentleman of Mr. Woodeson's acknowledged attainments and experience, could be led into a difficulty by expressions of this sort, how is it to be expected that students should, in the early part of their studies, be able to understand, in their technical sense, phrases of such doubtful or ambiguous meaning? Any one, except a lawyer, might read the Commentaries of Blackstone on this subject, and without any imputation on his judgment arrive at the conclusion, that no one except a person who had the *actual possession* of the land, was capable of a release in enlargement of his estate. The pointed language of Littleton and of Lord Coke, taken substantively and without the context, might be considered as leading to the same conclusion. Littleton, however, meant nothing more than to mark the difference between an *interesse termini*, and a term for years. The former is merely an *interest* in the land, and not an estate, while the latter is an actual estate (*w*). The interest, while executory, does not admit of enlargement (*y*). It may be released (*z*),

(*w*) Co. Litt. 270. a. 46. b.
and Litt. S. 58.

(*y*) Co. Litt. 46, b.
(*z*) 270, b.

or assigned (a), but cannot be surrendered (b); though certain acts are said to amount to a surrender in law; nor (as it is said) can it be confirmed (c); but this is at least doubtful; unless the proposition be applied to a confirmation in enlargement of an estate: for the same reason that an *interesse termini* cannot be enlarged by release, it cannot be enlarged by confirmation (d); nor is an *interesse termini* an impediment to a surrender, or merger, of a prior interest, in a more remote interest.

On this subject of possession, some of the expressions of Lord Coke are not more definite. His context, however, relieves the question from all difficulty. From this writer (e), and also from Sheppard's Touchstone (f), Sheppard's Abr. (g), and Mr. Butler's Annotations (h), and still more clearly from first principles, it is to be collected that an estate is capable of enlargement, although that estate, or the estate for years or for life is a reversion or remainder, and consequently does not confer a right to the immediate possession. In the succeeding division some further observations will be introduced illus-

(a) Co. Litt. 46, b.

(b) Co. Litt. 338, a. Shep. T.

301.

(c) Co. Litt. 296, b.

(d) Shep. T. 311.

(e) Co. Litt. 270, a.

(f) 322.

(g) 157.

(h) Note 3 on Co. Litt. 270, a.

trative of the origin and history of the lease and release, as parts of the same assurance.

2dly, *Of the principles on which this assurance depends.*

The difficulty respecting this assurance, as a substitute for a feoffment, vanishes when its distinguishing characteristics are examined. In its principles it is founded on the rules of the common law (i), and consists of two parts.

1st, An assurance creating an estate to be enlarged; and,

2dly, An assurance granting another estate in enlargement of the estate thus created, for the purpose of being enlarged.

The practice of a lease and release as parts of the same assurance, is founded on the rule that a particular estate, already vested, may be enlarged by the release of the person who has a reversion or remainder expectant on that estate; so as the two estates are connected in privity (k), in such manner as will afterwards be noticed. Since convenience dictated the use of the lease and release as parts of the same assurance, so in modern practice, the object of the lease for a year, is to create an estate which shall certainly be attended with the requisite privity, and con-

(i) *Barker v. Keate*, 2 Mod. 251. (k) Co. Litt. 273, a.

fer an interest which admits, beyond all doubt, of being enlarged.

To a valid feoffment, it is necessary that livery shall be made (*l*) by the feoffor, either in person or by attorney (*m*); and such livery must be made to the feoffee (*n*), in person or by attorney; and an attorney who is to give or receive livery, must be appointed by deed (*o*). Assurances intended to be made by feoffment, frequently failed of effect on account of some error attending the ceremony of livery. Besides the operation of the assurance is suspended till livery of seisin has taken place. As the livery is the essential part of the assurance (*p*), no seisin or estate passes till livery of that seisin is made.

The owners of lands lying at a distance from their residence were greatly embarrassed by this suspense in transactions respecting their property. It may reasonably be supposed that no purchaser would pay his purchase money, or mortgagee advance the intended loan, till his title was placed on a solid and certain footing, beyond the power of the seller or mortgagor, to defeat the intended sale or mortgage, by livery in the mean time, to some other person; or by

(*l*) Littleton, S. 59.

(*m*) Co. Litt. 48, b.

(*n*) Ib.

(*o*) Ib.

(*p*) Co. Litt. 48. Mr. Butler's
Note, Co. Litt. 271, b.

a revocation of the authority he had executed, or by any other accident, as the death of the grantor or grantee. Nor were the inconveniences much less, when the grant was of a reversion, or remainder expectant on a particular estate, in a stranger. By the common law, and till the statute for *the amendment of the law* (q), attornment of the particular tenant was essential to the validity of the grant(r); and the tenant might in many cases, withhold attornment: or the grantor or grantee might die before attornment had taken place. Each of these events would defeat the grant; for unless attornment was obtained in the life-time of the grantor, and also of the grantee(s), the grant became inoperative, and failed of effect. Besides, there was a notoriety attending livery, or attornment, which must have been distressing in transactions of delicacy, which required secrecy; and in giving the history of this assurance, it is said, this conveyance was at first only purposely contrived by Serjeant Francis Moore at the request of the Lord Norris, to the end that some of his kindred or near relations should not take notice by any search of public records what

(q) 4 Ann. cap. 16. sect. 9.

Sir Rowl. Heyward's case, 2

(r) Litt. s. 567.

Co. 35.

(s) Co. Litt. 309, a. 315, a.

conveyance or settlement he should make of his estate (*t*). In *Barker v. Keate* also, it is stated by Lord C. J. North, that Mr. Serj. Moore was the inventor of this mode of assurance.

The inconveniences thus experienced, naturally led men of extensive practice, to contrive some mode of conveyance, by which the estate might be transferred immediately, and without any interval, from one man to another, although both parties were at a distance from the lands; and without even the necessity of their meeting for the purpose, or their giving any written authority to deliver or receive the seisin.

It must have been observed, that the tenant of a particular estate might receive an *enlargement* of that estate, without any livery of seisin *to him* or any attornment *by him*; or even though another person was in possession, without any attornment of that person. The common law supplied various instances of this doctrine; and several authorities, applicable to this point, will be found in the sequel.

The steps towards this assurance seem to have been progressive. On principles of tenure the proper assurance to enlarge the estate

(*t*) Fabian Philip's Treat. on the Writ of Capias, 19, b. 4. Reeves's Hist. of the Com. Law. 335. Cruise's Digest, 4 Vol. p. 196.

of a person who was already a tenant by virtue of a particular estate was a release.

Hence it occurred to make a lease at the common law, as the means of passing the freehold, or even the inheritance, without livery (*u*). Such instances were however rare, and very little accommodation was obtained from this arrangement, as it was the practice to enter by virtue of the lease, prior to the execution of the release; or when the lands were already in the tenancy of some other person, the attornment of that person was requisite: and a grant would, in that case, be equally efficacious with a lease and release; and it may reasonably be concluded that the lease and release were, in more early times, applied only as an assurance of lands, held for an estate in possession (*v*), and as a substitute for a feoffment.

When the seller or purchaser was resident at a distance from the property; or the purchaser was so circumstanced on account of absence, &c. that he could not within a convenient time make a letter of attorney to receive livery; the necessity for a substitute for livery must have been particularly felt; and the active ingenuity of the Profession led them to the expedient of making a lease to *some person* resident on the spot,

(*u*) *Barker v. Keate*, 2 Mod. 252. (*v*) *Ib.*

merely for the purpose of creating a particular estate, that the lessee might enter, and the reversion might be divided from the possession, and the reversion thus severed, might be granted to the intended purchaser, and perfected by the *attornment* of the nominal lessee. Such must have been the motives which gave rise to the practice noticed by Lord C. J. North. (w), when he observes, "The usual conveyance at common law was by feoffment, to which *livery and seisin* were necessary, the possession being given thereby to the feoffee: but if there was a tenant in possession, and so livery could not be made, then the reversion was granted, and the particular tenant always attorned; and upon the same reason it was that afterwards a lease and release was held a good conveyance to pass an estate; but at that time it was made no question but that the lessee was to be in actual possession before the release."

Such grant, it must be remembered, operated strictly in the mode of a grant, and not as a *release*. It was a grant to a *stranger*, and not the repetition of a grant to the *tenant*: and even these, and the like contrivances, were rendered, in a great measure, unnecessary by the statute for transferring uses into

(w) *Barker v. Keate*, 2 Mod. 251.

possession (x): a statute which enabled the owner, through the medium of a conveyance to uses, to vest the seisin in a person at a distance: for this purpose a feoffment, or according to the circumstances of the seisin or ownership, a grant, and a selection of a proper person to receive such feoffment or grant, were all the requisites which were necessary. Still, however, there must have been livery of seisin of lands held for an estate in possession, and an attornment by the tenant, when the grantor had merely a reversion, or remainder, and transactions were exposed to notoriety by the necessity there existed for livery of seisin, or attornment of the tenant. A bargain and sale might indeed have been made after this statute: so as to vest an estate of freehold or inheritance in the bargainee; but such bargain and sale required inrolment, and the inrolment would express the very language of the transaction, and thus give it still greater publicity.

In the progressive steps which have been noticed, a leading principle was applied to practice; and the only inconvenience which remained was the necessity of entry by a lessee, or of attornment by the tenant, who already had a prior estate.

To prevent the necessity of such entry on

(x) 27 H. 8. c. 10.

the one hand, or of attornment on the other, must have been an object of improving practice, and that object was rendered still more important by the circumstances of the times, and the prospect of a more frequent change of property; a prospect arising from the disposition towards commerce, and the alteration in opinion respecting the policy of military tenures. Mortgages were now more common than at more early periods: and commercial credit would not allow of a disclosure of transactions of this sort. Founded on confidence, they required secrecy.

In the reign of H. 8. (y), the statute for *transferring uses into possession*, was passed into a law. By that statute, uses were transferred into estate. Various were the means by which uses were created. A bargain and sale was one of these means, and such bargain and sale might be for *years*, for life, or in fee (z). Shortly after the statute of uses was passed into a law, the statute of enrolments (a) was enacted. The object of this statute (b) was to introduce a ceremony which should be attended with notoriety, as a substitute for the ceremony of livery, attornment,

(y) 27 H. 8. c. 10.

(a) 27 H. 8. c. 16.

(z) Shep. T. 218. 2 Black.
Com. 338. 2 Inst. 671.

(b) Note to Co. Litt. 48, a.

&c. and it renders it necessary that all bargains and sales, under the statute of uses, for an estate of inheritance of freehold, shall be enrolled within a limited time; viz. six lunar months: but this statute is silent respecting the enrolment of bargains and sales for years; and in the reign of Queen Elizabeth several points were resolved: and they must have had considerable influence in regulating the practice, and in introducing the bargain and sale as a foundation for the release.

In *Sir Rowland Heyward's case* (c), the doctrine of the court was, "When a man
"seised of land in fee for money, demises,
"grants, bargains and sells his land for years,
"he, which is owner of the lands by his express grant, gives election to the lessee to
"take it by the one way or the other, for
"he hath sole power to pass it by demise or
"bargain, and therefore the law will not
"make construction against such express
"grant." And Lord Coke says, "It was
"agreed that if this interest should take
"effect by bargain and sale, then an attornment is not necessary, for the statute of
"27 Henry VIII. c. 10. of uses, doth execute
"the possession to it, and the statute of
"27 Henry VIII. c. 16. of enrolments, doth

(c) 2 Co. 35.

“ not extend to it, because no estate of freehold passes, but only an estate for years. Also at this day an use and interest pass in a manner *uno flatu* together, in an instant.”

And the 7th Resolution in this case was, although the lessees in the case in question have entered generally, yet they may afterwards elect either to take by the demise or by the bargain and sale ; for their general entry cannot be any determination of their election, more than if one be executor and devisee of a term, and he entereth generally, it is no determination of his election.”

And at the conclusion of the Report it is stated that the lessees made their election to take by bargain and sale, and thereupon they had rents, which otherwise they could not have.

In *Fox's case (d)*, the facts were, that Edward Fox granted the lands to Smallman and others for lives, and afterwards in consideration of 50*l.* demised them to Thomas Powys for 99 years, at a yearly rent of 40*s.* and the only point in the case was, whether the demise and grant to Thomas Powys should amount to a bargain and sale, so that the reversion with the rent should pass to Thomas Powys by the statute of uses, without

(d) 8 Rep. 93.

any attornment: and it was adjudged, " That
" the demise and grant upon consideration
" of 50/. amounted to a bargain and sale
" for the said years, for in case when a free-
" hold or inheritance shall pass by deed in-
" dented and enrolled, it need not have the
" precise words of bargain and sale; but
" words equipollent, or which do tanta-
" mount are sufficient(e). That the intent
" of the grantor may be well collected that
" he did intend that the grants should take
" effect presently, and should not depend
" upon any subsequent attornment, for the
" rent reserved thereupon was payable pre-
" sently, and therefore it will be reasonable
" that Thomas Powys the lessee should have
" the rent reserved on the first lease for lives
" presently, and that he cannot have before
" attornment, which peradventure will never
" be made, and *eo potius* because the said
" Thomas has no means to compel the first
" lessees to attorn: but if it shall pass as a
" bargain and sale, it shall be presently exe-
" cuted by the statute of 27 Henry VIII. for
" there needs no enrolment in this case, be-
" cause but a term for years passes and no
" estate of freehold, and there needs no at-
" tornment, because it is executed by the
" statute; and by this construction every one

(e) 7 Rep. 40, b. *Bedel's case*. *Barker v. Keate*, 2 Mod. 249.

“ will have remedy for that which he ought
“ to have.”

From the cases to which reference has been made, it was easily to be collected that a particular estate for years might be created by bargain and sale, and neither *entry*, *attornment*, or *enrolment*, was essential to the efficacy of this assurance. The bargain and sale passed an use, and the use was executed by the statute of 27 Henry VIII. for transferring uses into possession, and the use became a *term*, in other words, an *actual estate*; and the bargainee was without entry, precisely in the same circumstances as a lessee at the common law was after entry or attornment, with the difference only that a bargainee could not maintain *trespass* (f) for any injury to the possession, until he had actually entered; but this was a circumstance which though it affected the remedy for injuries to the possession, was not of any importance in the consideration of the principles on which the doctrine of releases in enlargement of a vested estate for years, depended.

This common-law doctrine of enlargement equally extends to estates of freehold and estates for years (g). But as an estate of freehold could not be created without obtaining

(f) Cro. Jac. 604. *Lutwich v. Mitton*, Owen, 87. *Green v. Wiseman*, Carthew, 66.

(g) Littleton, Sect. 450, 459-

livery of seisin, attornment on a grant, or enrolment on a bargain and sale, an estate for years *alone* afforded the convenience which was so desirable.

The material point for consideration was, whether an estate for years created by bargain and sale was capable of enlargement by the release prior to entry? And the learning and researches of the conveyancers of that day, aided by the decisions which took place on the statute of uses, and which have been already stated, enable them with safety and certainty, to arrive at the conclusion, that such estate being actually vested, was capable of enlargement, in the same manner and upon the same principles, that an estate created by common law demise was, after entry, capable of enlargement. The decisions in *Lutwich v. Mitton*(*h*), and *Barkerv. Keate*(*i*), confirmed these opinions.

In *Lutwich v. Mitton* it was resolved by the two Chief Justices, Montague and Hobart, and by Tanfield, Chief Baron, “That upon a deed of bargain and sale “for years, whereof he himself(*k*) is in possession, and the bargainee never entered, “if afterwards the bargainor make a grant “of the reversion (reciting this lease)(*l*)

(*h*) Cro. Jac. 604.

(*i*) 2 Mod. 249.

(*k*) The bargainor.

(*l*) Such recital is not abso-

lutely necessary. For the reasons stated in another part of these observations it is *prudent* to insert it.

“ expectant upon it to divers uses, that it
“ is a good conveyance of the reversion,
“ and the estate was executed and vested
“ in the lessee for years by the statute (*m*),
“ and was divided from the reversion,
“ and not like to a lease for years at the
“ common law; for in that case *there is*
“ *not any apparent lessee until he enters*, but
“ here, by operation of the statute, it abso-
“ lutely and actually vests the estate in him
“ as *the use*, but not to have trespass without
“ entry and actual possession; wherefore
“ *they would not permit this point to be further*
“ *argued.*”

In *Barker v. Keate*, Lord C. J. North, speaking of the conveyance by lease and release, said, “ At first when this sort of conveyance was used, the lessee upon the lease for a year did always make an actual entry, and then came the release to convey the reversion, but that being found troublesome, the constant practice was to make the lease for a year by the deed of bargain and sale, for the consideration of five shillings, or some other small sum, and this was held, and is so still, to be good without any actual entry, and the bargainee thereby is capable of a release, (though he cannot bring an action of trespass without entry): for when money is the considera-

(*m*) 27 H. 8. c. 10.

“tion of making the bargain and sale, it is
 “executed by the statute of uses, and so
 “the release upon it is good, but if the deed
 “be not executed it is otherwise.” And in
 delivering the judgment of the court in the
 same case, the same C. J. observed, “After
 “the statute of uses it became an opinion,
 “that if a lease for years was made upon a
 “*valuable* consideration, a release might
 “operate upon that without an actual entry
 “of the lessee, because the statute did exe-
 “cute the lease, and raised an use presently
 “to the lessee.”

“The lease and release are but in nature
 “of one deed, and then the intent of the
 “parties is apparent, that it should pass by
 “the statute, and *eo instante* that the lease is
 “executed, the reservation is in force.”

It was some time, however, after the first
 adoption of the lease and release, before the
 profession were reconciled to the assurance(*n*).
 Difficulties were suggested. They arose
 from a misapprehension of the principles on
 which the lease and release, as applied in
 modern practice, were founded: from ap-
 plying the common-law learning to an as-
 surance depending partly on a bargain and
 sale, which is an assurance deriving its effect
 from the statute of uses (*o*).

(*n*) 2 Black. Com. 339.

(*o*) *Barker v. Keate*, already
 cited.

While the profession read Littleton, or Lord Coke's comments in a literal sense, as requiring that there should be an estate accompanied with *actual possession*, and not merely a *vested estate* giving a present right of present or future enjoyment, they were perverting the *use*, and the object of this species of assurance; and were reasoning on principles which were inapplicable. The cases, however, of *Lutwich v. Mitton*, and *Barker and Keate*, removed these doubts, and from that period, the lease and release may be considered as having, for all purposes of general practice (*p*), superseded every other assurance, and as having been applied, with equal reason, and with equal security, in conveying lands held for an estate in possession, and lands held for an estate in reversion or remainder. We have the authority of Lord C. J. North, in his judgment given on *Barker v. Keate*, that "The case put by Littleton in section 459, is put at the common law, and not upon the statute, when he saith that if a lease be made for years, and the lessor releaseth all his right to the lessee before entry, such release is void, because the lessee had only a right, and not the possession which Lord Coke in his comment calls an *interesse termini*,

“ and that such release shall not enure to
“ enlarge the estate without the possession,
“ which is very true at the common law, but
“ not upon the statute of uses. And it was
“ determined that there was no need of an
“ actual entry to make the lessee capable of
“ the release, for by virtue of the statute he
“ shall be adjudged to be in actual possession.”

It cannot be too strongly impressed on the mind that the part of this assurance which is called a lease, operates in most cases as a bargain and sale, and is an assurance through the medium of the statute of uses, and not a common-law demise. However, (as may be collected from *Heyward's case* (q), and *Fox's case* (r), it is in the option of the person who claims under this assurance to use the same either as a common-law demise, with a release in enlargement of the estate; or as a bargain and sale, through the medium of the statute of uses, with a like release in enlargement. But the general mode of pleading this assurance ascribes to the lease for a year, the operation of a bargain and sale under the statute. This, however, is not necessary; and when circumstances will admit, the lease may be pleaded as a demise by the common law, perfected by entry (s); and if the per-

(q) 2 Co. 25.

(s) *Heyward's case*, 2 Co. 35.

(r) 8 Co. 93.

son who makes the conveyance has a remainder or reversion, the *lease* may be pleaded as a grant of that remainder or reversion for the term. Indeed, in the case of *corporations* it has been doubted whether they can stand seised to an use (t), and as a consequence whether a lease made by them can operate as a bargain and sale, through the medium of the statute, so that a release in enlargement may be effectual. For this reason it is generally advised (u), that *corporations* should convey by feoffment, instead of lease and release; or that there should be a lease and release, and an entry by virtue of the lease, before the release is taken, so that there may, prior to the release, be a term *at the common law* capable of enlargement. Nor will it be safe in practice to depart from this caution. But as it has been decided that a corporation may give an use (v), though they cannot stand seised to an use, there are grounds to contend that an assurance by a corporation by a lease, operating as a bargain and sale, and by a release in enlargement, would be supported. The assurance by lease and release is absolutely necessary, now that the necessity of attornment is superseded, in those

(t) Bacon on Uses, 347.
Shep. T. 508. Mr. Butler's
Note to Co. Litt. 271, b.

(u) Butler's Note to Co. Litt.
271, b.

(v) ——— Case, 1 Leon.
183. 2 Leon. 121. 3 Leon. 175.

cases only, in which it is substituted for a feoffment, so that the freehold or inheritance could not be passed without a feoffment, or a lease and release as countervailing a feoffment, or a bargain and sale enrolled under the statute of Henry VIII.

In a variety of instances which occur in every day's experience, the lease and release are used, when a *mere grant* by a single deed would be sufficient. But as the validity of the grant would depend on evidence, that the grantor had merely a reversion or remainder, and consequently it would be incumbent on the person claiming under this assurance, to show that there was a previous existing particular estate, the lease for a year is taken, by way of caution, that the grantee may have, in his own hands, evidence of the existence of a particular estate capable of enlargement.

So rent-charges, tithes, &c.; may pass merely by grant (w); nor is it usual when they are conveyed separately from other property, to use any other mode of assurance. They may, however, be effectually conveyed by lease and release.

On the effect of a grant to pass a *remainder* or *reversion* (x), Mr. Fearne seems to have

(w) Shep. T. 227.

Reading on the Stat. of Enroll-

(x) Fearne's Posth. Works, ments, p. 6.

fallen into an unaccountable mistake. He treats it as absolutely necessary that there should be either a lease and release, or a bargain and sale enrolled.

On this mistake, it is sufficient to observe, that at the common law, a grant was the only mode by which a reversion or remainder could be transferred (*y*) from the owner to a *stranger*; and the common law has in no respect been altered, except in dispensing with the necessity of attornment (*z*), as essential to the perfection of a grant.

It is said a lease and release countervail a feoffment (*a*). By this expression it must be understood that, considered merely as a conveyance, this assurance has the operation of a feoffment, and that it has this operation so far only as it is a conveyance of an estate of freehold or inheritance in possession; not that it has any of the collateral qualities of a feoffment; as divesting estates of strangers; purging disseisins; creating discontinuances, and the like (*b*). On the contrary, an assurance by lease and release operates only as a grant, and passes no more than the par-

(*y*) Co. Litt. 49, a. Shep. T. 227, 228.

(*z*) 4 Ann. c. 16. s. 9.

(*a*) Co. Litt. 207, a. 2 Black. Com. 339. Supra. And Mr. Butler's Note.

(*b*) See the distinctions in

Vin. Abr. Feoffment, B. 2, pl. 1. and the Note. Littleton, 600. 606. *Seymour's Case*, 10 Co. 95. *Machel v. Clark*, 2 Salk. 619. *Doe ex dem. Odiarne v. Whitehead*, 3 Burr. 704.

ties may rightfully pass ; and in these respects it is said to be an innocent or a rightful conveyance.

In many particulars there is a difference between a feoffment and a lease and release. A feoffment must be founded on the *possession* (c), and it must necessarily pass the seisin, whether it was at the time of livery in the feoffor, or in a stranger. Thus a feoffment may be a wrongful conveyance, operating as a disseisin of some other person ; and although the feoffor has merely an estate for years (d), for life (e), or in tail (f), or even a naked possession (g). Hence the observations of Mr. Knowler, in his learned argument in *Taylor v. Horde*, 1 Burr. 60, that “ a feoffment operates on the possession, without any regard to the estate or interest of the feoffor ;” and again, “ it is most clear that a feoffment may be made by any person in possession.”

In a feoffment also, livery is the essential part of the conveyance (h). The deed or charter of feoffment is merely evidence of the grant. It is in some cases only that such charter of feoffment is necessary, but a lease

(c) Co. Litt. 9, a. 366, b. 367, a. 328, a. Litt. 611. *Read v. Errington*, Cro. Eliz. 321.

(d) Litt. 611. Co. Litt. 330, b.

(e) Litt. 611. Co. Litt. 330,

(f) Litt. s. 599.

(g) 2 Inst. 412.

(h) Shep. T. 204.

and release are merely a rightful conveyance (i), and there must be a seisin as a foundation on which they may operate. They pass that degree of interest only which is in the grantor, and it is for this reason called an innocent conveyance (k). And a lease and release, either at the common law, or through the medium of a bargain and sale, cannot be pleaded as a feoffment (l).

In discussing the origin of the assurance by lease and release it has been necessary to advert to the principles on which it is grounded: it will here be proper to enumerate the more leading points; they are,

1st, By the doctrine of the common law, a vested interest for years, either in possession, reversion, or remainder, may be enlarged by release.

2dly, A lease for years, at the common law, of lands in possession, will not give an actual estate till entry; but a lease for years of lands in reversion, will, now that attornment is rendered unnecessary, give an actual estate without either entry, attornment, or other ceremony.

3dly, A bargain and sale for years may give an actual estate prior to entry.

4thly, An estate arising from a bargain

(i) Litt. 600, 606.

(k) Supra, p. 236.

(l) Broke Feoffment, pl. 44.

Vin. Abr. Feoffment, B. 2. pl. 1.

and sale for years, may vest *instante* (m), and be enlarged by release ; and

Lastly, The object of the lease for a year, more properly denominated a bargain and sale for a year, is to create such particular estate as may be enlarged by release.

2dly, *Of its Parts.*

A lease and release are considered in law as constituting one assurance, an assurance which consists of two parts (n), perfectly distinct, each producing its own particular operation.

1st, Of a lease for a year or some other short period, measured by a definite space of time so as to be a chattel interest ; and

2dly, Of a release in enlargement of the estate, created by the lease. It is of the essence of this assurance, as a substitute for a feoffment, that there should be a lease creating a particular estate, and separating the same from the inheritance ; so that there may be a reversion expectant on the particular estate ; for unless a particular estate is created, there does not exist any interest capable of enlargement (o). On the other hand, unless the inheritance is divided from the possession by means of a particular estate,

(m) See the next division.

(n) *Barker v. Keate*, 2 Mod. 252.

(o) Co. Litt. 279.

there is no interest of that particular species which can be granted by way of release (*p*). The reasons given against an assurance by lease at the common law, and release before the entry of the lessee, would apply with equal and still greater force as an authority for this point. The objections (*q*), it may be remembered, were,

First, that there was merely an *interesse termini*, and not an actual term, or estate; and the objection is applied with still greater weight when there is not any interest whatever, either by way of *interesse termini* or otherwise. The other objection was, that there was not any reversion divided from the possession, and as a consequence, there was not only the want of an interest capable of enlargement, but there was also a deficiency of that species of interest, which was the subject of a grant, capable of being passed by deed, without livery, enrolment, &c. (*r*). Hence this assurance is constituted of two acts, one perfectly distinct from the other, though both are taken into consideration by the law as parts of the same assurance (*s*). The lease for a year is usually contained in a deed, either poll or indented. A deed is not essentially necessary to the operation of the lease, but it is essential to the validity of the release; for the release creates a

(*p*) Co. Litt. 338, b.

(*r*) Co. Litt. 49, a. Shep. T. 227.

(*q*) Co. Litt. 270, a.

(*s*) *Barker v. Keate*, 2 Mod. 252.

particular estate, and the remaining interest of the grantor is a *reversion*, and this reversion cannot be transferred without a grant ; and a grant cannot be made without a deed (*t*).

In point of law, and generally in point of fact, an assurance by lease and release consists of two distinct acts contained in two distinct instruments.

1st. Of a lease for a year, in one instrument, dated on one day, and,

2dly, Of a release of the freehold or inheritance, in another instrument, dated on the next succeeding day.

It has been said, both these instruments may be contained in the deed, and written on the same parchment.

Beyond all question the two instruments may be dated on the same day (*u*), and may be, and generally are, executed in the same instant of time. In correct practice the execution of the lease for a year ought to precede the execution of the release; but even though it should be proved that the lease and release were executed in a different order, the release, being executed in the first instance, and the lease for a year afterwards, the law, in applying the rule which makes these two instruments parts of the same assurance, would, it is apprehended, reject this evidence of priority, and consider the legal operation

(*t*) Shep. T. 227.

(*u*) Lord Raymond, 276.

of the two instruments to be, 1st, a lease, and 2dly, a release. There are general principles with which such a decision may be easily reconciled, but till the precise point shall have been decided, a title depending on a lease and release executed in this mode, would by cautious practitioners be treated as doubtful. It is certain that in the absence of evidence of the fact, the law would presume the priority in the execution of the lease, as the means of giving effect to the release (v).

These observations apply to the assurance only when it is made by a lease and release as parts of the same transaction; when the particular estate is created solely for the purpose of being the foundation of the release; and also when the lease is by bargain and sale; for when the lease is at the common law, and of lands held for an estate in possession, there must be an entry by force of the lease, in the interval between the execution of the lease, and the execution of the release.

In investigating titles, it will sometimes occur that there is a release only without a lease for a year, as part of the same transaction. The object of the release is under these circumstances, to enlarge an estate previously existing and created independently of any intention to make the release. Cases of this sort depend on those rules of law, from which the

(v) 1 Burr. 106.

assurance by lease and release, as parts of the same transaction, originated, and of course they are to be considered, with reference to the rules of law which govern the doctrine of releases made in enlargement of estates, as that doctrine stood prior to the introduction of the assurance by lease and release, as a substitute for a feoffment. In other instances, the lease for a year may be lost, or may be defective in not having proper parties, or from an omission or error in the parcels. In instances of this sort also, it is frequently necessary to recur to the common-law learning; and the releases are for the most part found to be available (w), either as grants of the reversion, or remainder expectant upon some attendant term, or estate for life, or term in an ordinary lessee or occupier, being at least a tenant at will or copyholder, or as capable of operating as a release, in enlargement of some estate, which at the time of the execution of the release, was vested in the releasee. On this account it will be proper, in considering who may be a releasor, and who may be a releasee, to take a general view of the law as it applies to releases in enlargement of estate, independently of the more prevailing practice of making a lease for a year, as the

(w) *Roe v. Tranmer*, 2 Wilson, 682.

foundation of the release. With the exception also of those instances in which the lease for a year is perfected by entry, the student should always bear in mind that the lease for a year is, *in strictness*, a *bargain and sale*, giving a vested estate, through the medium of the statute which executes the use into possession; that is, into estate; and as often as passages are brought before his notice, which either express or seem to imply, that the lessee has or must have the possession, he must understand these passages, as meaning nothing more, than that the lessee has or must have an actual and vested estate. It is immaterial whether this vested estate confers a right to the immediate possession, or to the possession, only after the determination of some prior estate. It follows that it is indifferent whether the lease for a year is made by a person seised of lands held for an estate in possession, or of lands held for an estate in reversion or remainder. At the same time, care must be taken to avoid a mistake, into which these observations might easily lead a student. Although a bargain and sale for years passes an use, and that use may be executed *instantly* into estate by the statute (x); and such estate is a sufficient foundation for a release, the

(x) *Heyward's Case*, 2 Co. 35.

observation must be understood as applicable only to a bargain and sale, containing a limitation, which, from its nature and form, does give a vested interest. When the use depends on a contingency, or is to commence from a future day, the bargain and sale will not confer a vested interest, until the contingency has arisen, or that day is arrived. In the mean time there is not any *estate*, and of consequence the bargainee is not capable of a release, to operate under the rule which has been considered. The release, in this instance, as at the common law, may operate by way of discharge, to extinguish a rent; but it cannot have the effect of enlarging that which in point of law, or in fact, does not exist (*x*), or of granting the inheritance as a reversion, by means of the bargain and sale, since there is not any division of the possession from the inheritance. This observation will suggest the caution of making the estate limited by the bargain and sale, a vested interest; and on this point the necessary observations will be added in treating of the form of the lease.

3dly, and 4thly. *Who may be the Releasor, and who may be the Releasee.*

1st. In respect of personal qualifications.

2dly. In respect of estate.

(r) Co. Litt. 270, a.

1st. Whoever may be a grantor, and seised to an use, may be a bargainor, as the means of being a releasor, in the release; and whoever may be grantee, and is capable of an use, may be a bargainee, as the means of being a releasee in the release; and whoever may be a bargainor or bargainee, of the use, may be a releasor or releasee.

The terms of qualification, respecting the use, are added, to adapt the proposition to the circumstances, that the lease and release are, in their modern use, parts of the same assurance, and that the lease is to operate as a bargain and sale, through the medium of the statute for transferring uses into possession (y).

Some persons are incapacitated to grant, as
 Infants, for want of discretion,
 Married women, for want of free will,
 Lunatics,
 Idiots, and

Persons deaf, dumb, and blind;
 because these persons are deprived of all means of communication; but all these persons may be grantees; and when they are grantees, an use (z) declared of their seisin will be executed by the statute.

The King may grant, but he cannot stand seised to an use (a). So a corporation may

(y) 27 Hen. VIII.

(a) Bacon on Uses, 66.

(z) Bacon on Uses, 57.

grant, but it is to be found in books of the most approved authority, that a corporation cannot stand seised to an use (b).

An alien may grant, and such grant will be good as against himself; but void against the King, on office found: but neither an attainted person (c), or an alien (d), can *take a conveyance* to an use, which will be binding against the Crown or the lord of the fee (e). But an alien (f) or attainted person is capable of an use. It is sometimes supposed that neither an attainted person, or an alien, can stand seised to an use (g). This, if applied to the right to charge the seisin with an use, does not seem quite correct. The use cannot be executed, as against the King or the lord: but it is no where to be found, that an use bargained and sold by an attainted person, or an alien, will not arise, and be executed by the statute: and granting that an attainted person or an alien may bargain and sell an use, he may convey by lease and release.

That the Crown or the lord may defeat such alienation, is a point of very different consideration. The right of avoiding the

(b) Broke Abr. Uses, pl. 10.

(e) Dyer, 283. Poph. 72.

Bacon on Uses, 57.

(f) Godb. 275.

(c) *Pim's case*, Mo. 196.

(g) Gilbert on Uses, 5, 170.

1 Inst. 13, a, note 7.

(d) *King v. Boys*, Dyer, 283, b.

1 Inst. 2, a.

conveyance, depends on the right of alienation, as governed by common-law principles, and not on the ability of aliens, &c. to bind themselves by a bargain and sale of the use.

The cases of infants, married women, lunatics, idiots, persons deaf, dumb, and blind, depend on common-law principles, without any circumstance peculiar to the lease and release, as parts of one and the same assurance. There is an incapacity to alien; an incapacity created by the law for their sakes, and to protect them from undue advantages. They are equally, or rather more, incapable to make the release, than they are to make the bargain and sale. With a view then to the mode of operation of the lease and release, nothing, material to the illustration of the principles which govern the learning respecting this assurance, arises out of the relative situation of these persons. All these persons may receive the seisin under a conveyance to them: and uses declared of their seisin will be executed by the statute of 27 Hen. VIII.

It may be useful to observe, that prior to the case of *Zouch v. Parsons* (*h*), a lease and release by an infant had been treated by the profession, and by the best text writers, as absolutely void. Lord Mansfield, and the court of King's Bench, decided that a con-

(*h*) 3 Burr. 1794.

veyance by an infant by lease and release, was, under the circumstances which occurred in that case, voidable only and not void. But no lawyer of eminence has thought it safe to follow that decision in practice: and that excellent property lawyer, the present chancellor (*i*), has repeatedly approved the observations of counsel, when questioning the authority of this case. To admit, indeed, that such a decision is law, is to confound all distinctions; and to oppose all authority on this head. The law had admitted that an infant could make a lease reserving rent; thus a lease reserving rent was voidable (*k*), while a lease without any reservation of rent was absolutely void (*l*). The law also admitted that the feoffment or other gift of an infant by means of livery of seisin, was voidable only, and not void, when made by an infant *in person* (*m*), while it declared a livery of seisin made by the infant by means *of an attorney*, to be absolutely void (*n*).

These distinctions between livery in person, and livery by attorney, assumed that

(*i*) Lord Eldon.

(*k*) Shep. Touch. 267. Moor, 10.

(*l*) Plowd. 545. Shep. Touch. 267. Moor, 105. Except a lease to try a title by ejectment. The distinction between leases with and without rent has been

doubted: but quære if with sufficient attention to the authorities.

(*m*) Bro. Abr. Coverture, pl. 40. Ib. Infancy, pl. 1.

(*n*) *Whittingham's Case*, 8 Rep. 45, a. 9 H. 6. 6. Perk. s. 12, 13, 14. 2 Roll. Abr. 2.

the infant could not appoint an attorney; and consequently could not, through the medium of an attorney, give livery of seisin. An infant, it is to be observed, is always sued by guardian and not by attorney.

Many books of authority ascribe the defect of a feoffment by attorney, to the inability of the infant to make a deed. But in some instances an infant may make a binding deed: as in case of a single bill or bond for necessities; and leases by an infant may be good, although a deed is essential to the validity of the lease.

Though the case of *Zouch and Parsons* has not been expressly over-ruled, the probability is, that whenever the point shall require an express and explicit decision, it will be determined that a conveyance by lease and release, made by an infant, cannot, under any circumstances of interest or no interest in the infant, or benefit or no benefit to him, be supported.

It remains to be added that according to *Bacon on Uses* (o), an infant may in consideration of maintenance, &c. bargain and sell an use; in other words, may stand seised to an use; but the better opinion is, that an infant cannot raise an use by his bargain and sale (p). Bacon also admits, p. 67, that an

(o) p. 67.

(p) 2 Inst. 673.

infant cannot raise an use by covenant to stand seised, in consideration of blood or marriage. The obvious objection against the efficacy of this assurance is, that the infant cannot covenant; for a covenant cannot be created without deed; and for this purpose, an infant cannot make a deed.

The same observations which apply to a king, equally apply to a queen regent, and even to a queen consort (*q*). The king cannot stand seised to an use, even though the conveyance is to the king as an individual, and only for his life (*r*). It follows that he cannot make a bargain and sale for years or in fee, to operate through the medium of the statute of uses. This impediment is extended to property he has in his individual capacity, as well as property of which he is seised, *jure coronæ* (*s*). All the books agree on this point. Before the statute of uses the law was, as at this day, that the king could not be a trustee. A trust cannot be decreed against him. This exemption arises from his prerogative. No suit to enforce a right can be maintained against the Crown (*t*). As the king could not be compelled to per-

(*q*) Bac. on Uses, 56.

(*r*) Bac. on Uses, 56.

(*s*) Bac. on Uses, 57. Broke, Feoffm. to Uses, pl. 31.

(*t*) Year Book, 7 Ed. 4. 17.

form a trust, the law has considered him as discharged from the trust (*u*): and the statute of uses executed those trusts only for which there was a remedy at the time of passing the statute. That it is from the prerogative, of being exempt from suit, that the king cannot be seised to an use, or cannot be a trustee, may be collected from the admission, that if an individual who was chargeable with a trust, became king, he was immediately discharged from the trust. This would have happened in the person of Richard the Third (*v*), if an act of Parliament (*w*) had not been passed to prevent so manifest an injury. The doctrine of exemption from the trust has been carried to the extent that the *alienee of the Crown* (*x*) was not liable to perform the trust: so that the exemption of the Crown from the trust was a discharge of the lands themselves from the trust.

The case of the *queen consort*, turns on the prerogative of her husband; in regard to the government and interest the king hath in her possessions (*y*).

(*u*) *Week's Case*, 2 R. A. 780.

(*v*) Bac. on Uses, 57.

(*w*) 1 R. 3. c. 5.

(*x*) Bac. on Uses, 57.

(*y*) Bac. on Uses, 57.

The language of the ancient as well as the modern books is, that a corporation cannot be seised to an use (z). Hence the objection, in practice, that a corporation cannot convey by a lease for a year, operating as a bargain and sale, and a release. This objection equally applies to sole corporations; and to corporations aggregate of many (a). But in regard to sole corporations, as a bishop, there is this diversity: a conveyance to a sole corporation *to uses*, will be good, for the benefit of the corporation; and the estate will not be subject to the use which is declared: while a bargain and sale by a *sole* corporation will be good, during the office of the person by whom the bargain and sale is made (b). Thus the law admits the individual to be *bound*, as far as he has individually an ownership.

The language of Bacon is (c), "If a bishop bargain or sell land whereof he is seised, in right of his see, this is good during his life, it should be during his incumbency, otherwise it is where a bishop is enfeoffed to him and his successors, to the use of J. D. and his heirs, this is not good; no

(z) Bac. on Uses, 57.

(a) Bac. on Uses, 57.

(b) Bac. on Uses, 57.

(c) p. 57.

"not for the bishop's life; but the use is
"merely void."

From this distinction, if allowed to prevail, it will follow that a lease and release by a sole corporation, is an efficient conveyance (for a time), while a like conveyance by a corporation aggregate, is open to the objection, that the lease, or bargain and sale for a year, is inoperative, and cannot be a foundation for a release.

The alleged reason for which a corporation cannot stand seised to an use, is, "because their capacity is to an use certain (d);" again, "because they cannot execute an estate without doing wrong to their corporation or founder (e);" and finally, because the Court of Chancery could issue no process against the individuals for the execution of the use (f). So that there could not be any privity of person, or personal confidence.

Hence the practice, for corporations aggregate to convey by feoffment, or by lease at the common law, perfected by entry prior to the release, and then by a release in enlargement of the estate granted by the lease (g). In one case it was admitted, that a corporation might give an use, although it could

(d) Bac. on Uses, 57.

(g) *Holland v. Bonis*, 2 Leo.

(e) Bac. on Uses, 57.

157. 3 Leo. 175.

(f) Cruise on Uses, 22. Gilb.
on Uses, 5 Plow. 102.

not stand seised to an use: and it was supposed that a bargain and sale in fee, by a corporation, was sustainable as a valid assurance.

In the distinction, that a corporation may give an use, and that it cannot stand seised to an use, there is a refinement not fit to be followed in judicial decisions. There is a difference in terms only, and not in substance, or in sense. If a corporation can give an use, it must be on the ground, that it can stand seised to an use: and if a corporation can give the use of the fee, it can, with equal reason, give the use for a term of years: and, the use being given, the statute will execute it into estate, and the estate thus created, may be enlarged.

The case which admits the bargain and sale in fee to be efficient has not been followed in practice: nor can it be supported in principle, consistently with the doctrine, that a corporation cannot stand seised to an use. Either the rule that a corporation may give an use, or the more ancient and more approved rule, that a corporation cannot stand seised to an use, must be abandoned, whenever the question shall be brought forward, for judicial decision; unless the rule *stare decisis* shall be allowed to prevail, and establish one of those anomalies which disgrace the law as a science: although it must be admitted that every decision, right or wrong, ought to be

followed, if it has once become an acknowledged rule of property. The more ancient rule, that a corporation cannot stand seised to an use, seems too well established to give place to the more modern decision, that a corporation may give an use: and that decision has never been followed in practice, so as to become an acknowledged rule of property. Perhaps it may be safe to say, that there are not three titles in the kingdom depending on the question whether a corporation can give an use; in other terms make a bargain and sale in fee, under the statute of uses; as a departure from the rule that they cannot stand seised to an use, so as to convey by a bargain and sale for a year, and a release grounded on the estate of the bargainee.

From the rule that a corporation cannot stand seised to an use, it would be a fair and reasonable inference that a corporation could not be a *trustee*, and that a specific performance of a contract could not be decreed against them. This inference, however just in its analogy, is not warranted by the acknowledged doctrine of modern times.

Corporations frequently are trustees for charitable and other purposes: and no one is at liberty to doubt that these trusts are binding on the corporation; and contracts for sale are binding on corporations as well as on individuals. In these particulars, also,

there is an inconsistency, which destroys the uniformity of the law, and renders its study so abstruse. Granting it to be true, that a corporation cannot give an use, or cannot be seised to an use; it ought to follow as a deduction from the same principles, that it cannot be a trustee or make any contract which a court of equity can enforce. If a corporation could not have been a trustee before the statute of uses, no alteration in the law on this head, has been made since the statute: and to be consistent it ought to have been decided that a corporation cannot be a trustee in modern times. But if it be admitted that corporations might before the statute, have been charged with trusts; then the statute of uses might reconcile the distinction, by allowing the conclusion, that the statute for transferring uses into possession, applies to the seisin of "persons," and not to the seisin of corporations: thus leaving the uses or trusts, declared of the seisin of corporations, in the same state in which they were found. The learned Bacon in his examination of the statute of uses, and the decisions grounded on the same (*h*); and in comparing the law since the statute of uses, with the rules of equity and of law, founded on several statutes

(*h*) Bac. on Uses, 57.

prior to the statute of uses, adverts to this difficulty. After stating the reasons against a corporation being seised to an use ; he adds, “ but chiefly because the letter of this statute, which in any clause when it speaketh of the feoffee resteth only upon the word “ person, when it speaketh of *cestui que use* (i), “ it addeth person or body politic.” In this place, however, let it be remarked, that the same objection equally applies to the execution of an use, as against a corporation sole ; for example, a bishop ; and if that point is not expressly decided (and no decision has occurred) it may require further consideration.

It remains to be observed under this head, that uses may be declared on a *conveyance by* a corporation, which passes the seisin from them to a person, capable of standing seised to an use.

It rarely happens that a corporation is advised to convey by lease, even at the common law, and a release in enlargement. But this is sometimes done ; and then the lease is taken in the name of some one, who may actually enter ; and after the lessee has entered, the release is executed. On the lease or on the release, a memorandum of the entry should be made ; and the release should

(i) Bac. on Uses, 57.

recite the fact of entry. This recital will be given, in shewing the forms of the lease and release.

An attainted person has the capacity of being a grantee(*k*), but the grant will enure for the benefit of the king(*l*). So an alien may be a grantee, but the benefit of the grant will belong to the king by his prerogative(*m*).

On these points the following passages are to be found in Bacon's valuable Reading on Uses. "If an attainted person be enfeoffed to an use, the king's title after office found shall prevent the use, and relate above it, but until office, the *cestui que use* is seised of the land."

"Like law of an alien, for if land be given to an alien, to an use, the use is not void *ab initio*; yet neither alien nor attainted person can maintain an action to defend the land."

In these points the common law was closely followed. The law distinguishes between the legal seisin, and the use derived out of that seisin; giving to the crown the common law benefit of even a momentary seisin; allowing the use to be good, as against the attainted person, and the alien: but the crown is at liberty to interpose and

(*k*) Perk. § 48.

(*l*) Co. Litt. 2, b.

(*m*) Co. Litt. 2, b.

claim the lands by reason of the seisin, which was in the attainted person, and the alien respectively. The claim of the crown when established is paramount to the use: it is founded on prerogative (*n*); and the title by prerogative supersedes that of the use; and intercepts its operation. Respecting attainted persons, it is to be observed, that the person who is attainted, though *civiliter mortuus*, is capable of being a grantor or grantee even after attainder (*o*). Notwithstanding the crime has been committed, he may before attainder, and after the crime committed, alien, even as against the lord, claiming by escheat: though he cannot after the crime committed, alien as against the lord claiming the benefit of forfeiture, viz. the year, duty, and waste, or in cases of treason the inheritance.

The case of an attainted person must then be understood, as depending on a grant made *to a person* after he was attainted, and when he was incapable to convey. But on this point of title there is, it should seem, a difference between attainder for felony, and for treason. The title under attainder for treason is by reason of *forfeiture*: and the relation of title is to the time of the crime

(*n*) Co. Litt. 2, b.

(*o*) Perk. 26, 48. Shep. T. 200, 231, 205. Co. Litt. 2. 6.

committed. In cases of attainder for felony, the only forfeiture is of the rents and profits for the life of the criminal, and the year, day, and waste from his death. Should there be an escheat it must be *pro defecto sanguinis*, (viz. want of inheritable blood,) *propter delictum tenentis*, (by reason of the crime of the tenant.) In the case of treason, the alienation between the crime and attainder will not, and in the case of felony, it will avail. But it seems no alienation after attainder, even for felony, will be valid against the lord (*p*). After attainder of a tenant in tail, he may by fine or common recovery (*q*), bar the intail, and by common recovery, bar the remainders and reversion expectant on the intail (*r*); at least this is the better opinion (*s*); and this opinion is quite consistent with the point “that a man attainted of
 “felony or murder, &c. may make a grant
 “of rent or common, or a feoffment, &c.
 “and the same shall bind all persons but
 “the king for his time, and the lord of
 “whom the land is held, when his time shall
 “come (*t*).”

It may not be without its use to observe that though a woman may not sue her husband, a husband may stand seised to the

(*p*) Co. Litt. 2, b.

(*q*) Shep. T. 6.

(*r*) *Stevens v. Winning*, widow,
and others, 2 Wils. 219.

(*s*) Contra, *Barton's case*,

2 Roll. Abr. Jenk. Cent.

(*t*) Perk. S. 26.

use of his wife : and even an use may arise from his seisin, although such use as in the case of a term for years, will immediately after its existence, be in his power(*u*). The general conclusion is, that all persons who are in the *per* ; that is, derive their title by the conveyance of the former owner ; may stand 'seised to an use ; while those who are in the *post* ; that is, come in under the 'paramount title, as the lord by escheat ; are not bound by uses(*v*).

So disseisors and other wrong doers, who assert a title independent of that of which uses are declared, are not bound by the uses declared of the seisin they avoid. This doctrine, though proper to be understood for illustration, is less relevant in modern times, than it was at or about the time when the statute of uses was enacted. The instantaneous operation of the statute, by converting the use into an estate, excludes the greater part of these questions ; leaving all the other cases, except those of the king, corporation, attainted persons and aliens, a dead letter ; at least as far as they are applicable to the points now under consideration. The cases of the king, and of corporations, are still important, as they are a barrier through the medium of a technical

(*u*) Bac. on Uses, 59.

(*v*) Jenk. Cent. 193. pl. 92. 1 Rep. 122. *arguendo*.

objection, against raising an use from the seisin of the king or corporation, so as to give an estate, admitting of enlargement. That the doctrine may not be carried further than it ought to be, it will be proper to add, that an attainted person or alien, and also a corporation, may be a *cestui que use* ; consequently they may receive an use, though they are as to the corporation altogether, and as to the attainted person, and alien *sub modo*, disqualified, or incapacitated from standing seised to an use, on a conveyance to them. From these deductions, it is easy to arrive at the conclusion, a conclusion well warranted by law, that a conveyance to a corporation, or an attainted person, or an alien by lease and release, is free from objection. In these instances, the use arises from the seisin of the grantor ; and he may be seised to an use, and the corporation, the attainted person, or the alien is capable of the use. But if uses should be declared of the estate passed to them by the release, then the objection will recur, that though the release is good, and well warranted and supported by the lease ; the uses declared on the release are open to the objection, that the corporation, or as against the lord or the crown, the attainted person or the alien, cannot be seised to an use.

2dly, In respect of estate.

That a man may be seised to an use, he must have or take an estate of freehold (*w*). That estate alone gives a *seisin*; it follows that tenant for life, or tenant in fee, may make a bargain and sale for years, or for any estate co-extensive with or less than the estate of the grantor. By *seisin* is to be understood, not only the interest, but also the state of the title. A man who is disseised, or whose estate is discontinued, has not any *seisin*: it follows that he cannot stand seised to an use. He must restore his *seisin* by entry or claim, before he can acquire the ability of conveying by lease and release (*x*).

In the old books it is supposed that tenant in tail cannot stand seised to an use. In every day's experience it occurs, that tenants in tail convey by lease, being a bargain and sale for a year, and release; or by bargain and sale alone to another and his heirs (*y*); and no doubt is entertained of the validity of either species of assurance, as good against him, and voidable only, and not void as against his issue. Even his covenant to stand seised to an use, will operate except

(*w*) Jenk. Cent. 195. pl. 1. 5 Cent. c. 1. 3 Bulstr. 184.

(*x*) Gilb. Uses, 205. Jenk. (*y*) *Seymour's case*, 10 Rep. 95.

under particular circumstances. The excepted case is a covenant by tenant in tail to stand seised to uses, to commence in *terms*, after his death (z). As such uses interfere with the better title of the issue, the use will not arise, at least as against them. Should the tenant in tail alien, and bind his issue, it is a question for consideration, whether the use may not arise. The objection will be *quod ab initio, non valet, tractu temporis non convalebit*. The elaborate judgment of Lord Chief Justice Holt in *Machel v. Clark* (a), contains the leading and more material points, respecting alienations by tenant in tail.

The doctrine that tenant in tail could not stand seised to an use, raised the question whether he could receive a conveyance, of which uses could be declared. After much discussion on this point, the result is, that no use will be implied in a conveyance to a man, as tenant in tail. As he takes a particular estate, and for a special purpose, the law will imply the use in his favor, and no use will result (b). But when a conveyance is made to a person as tenant in tail, upon an use which is expressed, the statute will

(z) Lord Raym. 781.
(a) Lord Raym. 781.

(b) *Cooper v. Franklin*, Cro. J. 400.

execute this use into estate (c). These latter points, it will occur, are material to the consideration of the operation, and effect of the release; and not of the mode in which the lease and release, as parts of the same assurance, derive their efficacy. They concern the uses declared on the release, and have no application to the lease for a year, as the foundation for the release. It may also be called to recollection from the passages in a former volume, that tenant in tail who levies a fine, or suffers a recovery without declaring any use, will have a fee, and not his old in-tail, by *resulting use*.

In the further consideration and investigation of the points, under this and the former division, let the reader carefully distinguish between those cases in which the question is, whether the seisin, which a person already has, can be subjected to an use, while the estate remains with him, and whether he can receive a conveyance to uses, or can make a conveyance to uses.

There are three classes of cases; under the first, we may rank those of

The king.

Queen regent.

Queen consort.

Corporation.

(c) Godb. 269. Bac. on Uses, 57.

And no use can be given them, so as to charge *their seisin* with an use, and consequently they cannot convey by a bargain and sale for a year, and a release grounded on the same. On this point, there was some distinction respecting villeins, &c. which is no longer material.

2dly, They and various other persons, as tenants in tail, may take a conveyance to uses, which will be executed by the statute as against them, but as against other persons having paramount titles affecting the seisin, as in the case of attainder, alienage, issue in tail, &c. the conveyance will be good; and the uses will, as against the lord, &c. be void.

3dly, All these persons, and all other persons who are competent to convey, either absolutely or as against themselves, &c. can make a conveyance to uses; and the uses will be good, till the conveyance shall be avoided.

The two last points embrace considerations peculiar to the uses declared by the release, independent of the effect of the lease and release, as parts of *the same assurance*.

To understand with precision the learning applicable to this sub-division, it will be proper to take a comprehensive view of the general doctrine of the common law, respecting releases in enlargement of an estate.

It is on this doctrine that the assurance by lease and release, as used in modern practice, is fundamentally grounded.

In reference to this object it shall also be considered, who may be the releasor in respect of estate, and who may be the releasee in respect of estate.

1st, Who may be the releasor.

As it may be collected from a former observation, it is essential that the releasor should have a *vested interest* (*d*), in his own right, or in right of his wife (*e*).

It will not be sufficient that he has a *contingent remainder* (*f*), an interest by *executory devise* (*g*), or a mere *possibility*, hope, or chance of succession; as is the case of an *heir apparent*, or heir *presumptive* (*h*). Persons thus circumstanced, may create estoppels (*i*), but they cannot make grants available to *transfer* their interests (*k*): and a release is, in its mode of operation, a grant by way of transfer, and not merely of discharge, as a release by way of *mitter le estate* or *mitter le droit* (*l*). Also a person who has merely a right of entry, or of action

(*d*) Litt. § 458. Shep. Touch. 331.

(*e*) Co. Litt. 273, b. Shep. T. 324.

(*f*) 1 Fearn, 537. Co. Litt. 214, a. Shep. T. 238, 325.

(*g*) 2 Fearn Shep. T. 238. *Lampet's case*, 10 Rep. 8, b.

(*h*) Hob. 45. Litt. S. 446. Co. Litt. 265, a.

(*i*) *Weale v. Lower*, Pollex. 54. Perk. § 86.

(*k*) Co. Litt. 214, a.

(*l*) Co. Litt. 273, b.

as a disseisee, or person whose estate is discontinued, has no estate to be enlarged (*m*). He may release to the disseisor by way of extinguishment of right, but the disseisor cannot release to him with effect. A release would, however, in all probability, amount to a renunciation of the disseisin, and do away its effect.

By modern decisions it is established that possibilities coupled with an *interest are devisable* (*n*). It is also settled that they may be released, *by way of extinguishment of right* (*o*), or may be bound by way of estoppel (*p*).

In equity, owners under contingent remainders and executory devises, may bind themselves by *contract for a valuable consideration*. In this sense, and to this extent, these interests are transferrable. But because they are transferrable in equity, it by no means follows that they are grantable at law: on the contrary, the decisions in equity suppose and admit, that the conveyance has no *legal operation*. When it is said in some recent decisions that these interests are assignable (*q*); that expression must, it is submitted, be

(*m*) Shep. T. 319. 322.

(*n*) *Roe v. Jones*, 3 Term Rep. 38. 1 Hen. Blackst. 30.

(*o*) Co. Litt. 214. Shep. T. 238.

(*p*) *Weale v. Lower*, Pollex. 54. *Buckler's Case*, 2 Rep. 55. *Moore's Case*, Palmer, 365.

(*q*) *Roe v. Jones*, 3 Term Rep. 88.

understood with the restrictions and qualifications expressed in this work. This remark is more necessary, because some gentlemen of the highest eminence have advanced the doctrine, *that possibilities* coupled with an interest are grantable; these persons considering by *some unaccountable mistake*, that whatever is DEVISABLE, IS GRANTABLE. The rule is only that whatever is grantable is devisable: and some interests which are devisable are not grantable; for example, the interest under Contingent Remainders and Executory Devises.

As connected with this subject, it may be observed that contingent interests to the *survivor* of several persons (*r*); or to persons who shall answer a given description, and who are not yet ascertained, as the children of *A. who shall be living at his death*; or the expectancy of an heir, though they are possibilities coupled with an interest, are not, it is apprehended, *devisable* (*s*), or even releasable: and in a late case (*t*) of great anxiety, and very fully considered, it was decided in the court of King's Bench, that a right or *title of entry, or of action*, though an interest which is *releasable*, is not devisable.

(*r*) 1 Fearn, 541.

(*t*) *Goodright v. Forrester*, 8

(*s*) *Doe v. Tomkinson*, 1 Maule and Selwyn, 165. cited *infra*. East, 552.

On this judgment there was a writ of error brought in the Exchequer Chamber, and this point was fully argued and discussed; but the decision of that court was founded on another point—the bar by non-claim on a fine with proclamations: The Ch. Justice of the Common Pleas, who delivered the judgment of the Court of Exchequer Chamber, distinctly and repeatedly declared, that there was not any intention in that court of questioning the judgment in the King's Bench (*u*).

That expectancies may be bound by estoppel, is the consequence of a rule of law, concerning titles, and not of any present interest in the parties. Equity holds the contract of an expectant heir who becomes heir *de facto*, binding on him: but this equity is deemed personal to the party, and does not extend to his heir (*v*).

It is immaterial whether the releasor has an estate in possession (*w*), reversion, or remainder (*x*); or whether he is a joint-tenant, or tenant in common, or a coparcener, or even seised by *entireties*. The release may operate under all these circumstances. It may also operate whether it proceeds from a

(*u*) This is stated from the author's knowledge of the fact.

(*v*) *Clayton v. Duke of Newcastle*, 2 Cha. Ca. 112. *Morse*

v. Faulkener and others, Anstr. 11.

(*w*) Co. Litt. 265, a.

(*x*) *Shep. T.* 321.

person seised of an estate in *fee simple*, *fee tail*, or *for life*. All that is requisite is, that there should be in the releasor an estate of *freehold* or *inheritance*. The statute of uses (*x*) applies to estates of those persons alone who are *seised*; and it follows that the bargain and sale, as part of the assurance by lease and release, must proceed from a person who has an estate of inheritance, or at least an estate of freehold. The use declared of the estate of a *termor* for years (*y*), or of the estate of the owner of any other chattel interest, cannot be executed into estate by the statute.

The releasor must also be a person who in point of estate may stand seised to an use. Instances have already been enumerated of the king, a corporation, &c. in which the use cannot arise by reason of some circumstances peculiar to the grantor; and it has already been noticed that a tenant *in tail* may, under certain modifications, stand seised to an use. The observations on that point prove that a lease and release by a tenant *in tail*, will be an efficient conveyance to pass his estate (*z*). Such conveyance, however,

(*x*) 27 Hen. 8.

Machel v. Clark, 2 Lord Raym.

(*y*) 1 Dyer, 369, a. pl. 50.

Doe v. Whitehead, 3 Burr.

(*z*) *Seymour's Case*, 10 Rep.

Stapylton v. Stapylton, 1 Atk. 2.

will be defeasible by the issue in tail, the remainder-men or reversioner, unless the proper ceremonies for barring the interest of these persons shall be observed.

Fourthly, Who may be the releasee.

1st, In respect of personal qualification ;

2d, In respect of estate.

First. Any person capable of a grant may be the grantee in the lease, and also in the release.

Secondly. The principal point to be regarded is, that, either in fact or in intendment of law, the releasee should, prior to the execution of the release, have acquired an estate vested, either in possession, or in reversion or remainder (*a*), to be capable of enlargement. The lease for a year is, in modern practice, made with the intention, and, in skilful hands, with the declared object, of creating an estate, which may admit of enlargement; and it is to be called to mind that the grantee must have an actual term or estate, and not merely an *interesse termini*, or a right of entry, or an executory interest (*b*). And it is to be remembered, that under the rules of the common law, a lessee has not any estate till entry on lands held for an estate in possession ; nor before the statute for the amendment

(*a*) Litt. s. 459. Co. Litt. 270.

(*b*) Litt. s. 459. Co. Litt. 46,
b. 270, a.

of the law had he any estate, till attornment, when the lands were held for an estate in reversion or remainder. Immediately after opening the learning, in the next division, a more detailed view will be taken of the rules which concern this part of the assurance.

But a *seisin* in law will suffice, to support a release, in enlargement of the estate; as is the case of a release to a tenant for life in remainder, during the continuance of a prior particular estate, or after the determination thereof, and before *entry*.

A few observations will now be proper, respecting the tenant whose *estate*, or interest, is capable of being enlarged by release.

A person who has the fee (c), has the utmost extent or degree of interest of which a man is capable: in the language of Littleton (d) "a man cannot have a more large" or greater estate of inheritance than fee-simple." His estate does not admit of any increase. It may be determinable, or defeasible; and these qualities may cease, or they may be discharged by a release (e). Such release operates by way of *extinguishment* of right or title (f) and not as a release in enlargement of a prior estate.

(c) Essay on the Quantity of Estates, Chap. Fee.

(d) Litt. s. 11.

(e) Essay on the Quantity of

(f) Shep. Abr. Chap. Extinguishment.

When an instrument operates as a release by way of enlargement, it transfers an estate. It passes a seisin; in short, it is a conveyance. From these deductions it follows that uses may be, and they are continually declared of the seisin, transferred by this assurance. *No use* can be declared on a release of right, or of title, or of a possibility; and of this nature is a release of the determinable or defeasible quality of an estate in fee. There is one species of fee which it should seem admits of enlargement. This is the particular and peculiar case of an estate-tail, or a fee converted from an intail into a base or determinable fee (*g*). In this instance, the base or determinable fee may be in one person, and an actual estate may be in another person. Consistently with principle, a base fee, being a particular estate, may be enlarged, by the accession of the remainder or reversion in fee, conferring the ulterior interest; for there is an estate to be added, and that estate is, in legal denomination, and in legal intendment, larger than this base or determinable fee. This instance forms an exception to the general rule, that one fee cannot be dependant, or expectant, on another fee (*h*). The rule is true, only when

(*g*) Co. Litt. 18. a. *Machel* (*h*) Co. Litt. 18, a. *Essay*
v. *Clark*, 2 Lord Raym. 778. on Estates, Chap. Fee.

understood with the qualification, that one fee, cannot, *by the grant* of the party, be expectant on another fee, not being a particular estate, and no fee, except a fee-tail, or a base fee arising from an estate-tail, is considered as a particular estate.

The conversion of an estate-tail into a base fee, is merely a consequence of law, and the necessary result of the statute *de donis* (i), which made the conditional fee, of antient times, the estate-tail; a particular estate, of modern times. When a man grants an estate to another and his heirs, determinable in any manner, he retains merely a *possibility of reverter*. This possibility may be released to the person who has the determinable fee: but notwithstanding Mr. Fearne's (j) ingenious reasoning to establish a contrary doctrine, the more correct opinion, drawn from the principles of tenure, seems to be, that this possibility does not admit of being granted. On the other hand, an actual reversion or remainder may exist as an *estate* after the creation of an estate-tail; and this reversion or remainder, though it becomes expectant on a base fee, as the ownership arising from an estate-tail, after its descendible quality has

(i) 13 Edw. I. c. 1.

Stat. de Donis, 13 Edw. I. c. 1.

(j) 1 Fearne's Contingent
Rem. Butler's Edit. p. 359.

Co. Litt. 18, a.

been changed from the issue in tail to the common law heir, confers an interest which may be granted from one person to another. For that reason, it may be released to the person who has the base or determinable fee, in enlargement of his estate. Hence also the decision that a base fee acquired from the alteration in the descendible quality of an estate tail, may merge in the ultimate remainder or reversion in fee (*k*). No doubt is entertained that an instrument in the form of a lease and release would operate by way of release of the possibility, when there is merely a possibility of reverter. The case is noticed only for the sake of a distinction, and to illustrate the general principles on which the assurance by lease and release depends.

Let it also be remembered that when a tenant in tail discontinues (*l*), or a tenant for life aliens tortiously, and thereby divests the reversion or remainder (*m*), the reversion or remainder is converted, in the former instance, into a right of action; and in the latter instance, into a right of entry: and such right of entry may eventually by the

(*k*) *Symonds v. Cudmore*, 4 Mod. 1. *Kinaston v. Clarke*, 2 Atk. 204. *Shelburn v. Bidulph*, 6 Bro. Parl. Cas. 53. Edit. 1803.

(*l*) Litt. Section 592. and the commentary.

(*m*) *Bredon's case*, 1 Rep. 76. *Goodright ex dem. Burton v. Forrester*, 1 Taunton, 578.

statute of limitations, or by a descent which tolls the entry, become a mere right of action (*n*). In each of the instances, the right or title of entry or of action, may be released by way of extinguishment. In neither case can it be released by way of enlargement of estate; since the remainderman or reversioner does not retain any estate. He has merely a right of action or of entry to restore or revive his estate. This subject, with the principles by which it is governed, will be found in the arguments, in the case of *Goodright* on the demise of *Burton v. Forester*, in the Court of Exchequer Chamber (*o*), and the chapter on alienation by tenant in tail in the tracts on cross remainders, &c.

To guard the reader against an error into which these observations and first principles might easily lead him, he ought to be apprized, that it is decided by two cases (*p*), and was expressed to be the opinion of Lord Alvanley in another case (*q*) that if a person become seised in fee, subject to an executory devise to take place on an event which happens; and before the event happens,

(*n*) Tracts on Cross Remainders in Chap. on Alienation by Tenant in Tail.

(*o*) 1 Taunt. 578.

(*p*) *Goodright v. Searle*, 2 Wilson, 29. *Goodtitle v. White*, 2 New Rep. 383.

(*q*) 3 Bos. and Pull. 655.

the interest under this executory devise, descends to him, and afterwards he dies intestate, leaving two classes of heirs: one to the seisin which he had; the other to the interest which he derived under the possibility; the heir to the possibility, and not the heir to the seisin, shall be preferred. These decisions of course deny that the possibility was extinguished in the estate; for if the possibility had been extinguished; it could not have governed the descent. With every respect the author feels for the decisions of the courts, he considers these cases as anomalous.

With this impression, and the opinion of those most conversant with the subject, including Mr. Watkins, who in his Treatise on Descents (r) had adopted the proposition from *Goodright v. Searle*, and whose name can never be mentioned with too much respect, either for talent, learning, industry, or liberality: this point was again brought under discussion in the case of *Goodtitle, lessee of Elizabeth Vincent, v. White* (s), and the decision of the Court of King's Bench was founded on the former determinations in *Goodright* and *Searle*, and *Goodtitle* dem. *Vincent v. White* (t). Still, however, it was determined to appeal from

(r) Watkins on Descents, (s) 15 East, 174.
c. 3 s. 2. 155. (t) 2 New Rep. 383.

the judgment of the Court of King's Bench to the Court of Exchequer Chamber. The decision in the latter court will be considered conclusive between these parties, since the property will not bear the expense of further litigation. For the sake of principle, rather than of the precedent afforded by *Goodright* and *Searle*; a precedent which, if an opinion may be formed from the report, arose from a confusion of the doctrine of extinguishment with the doctrine of merger; it is to be hoped that the Court of Exchequer Chamber, guarding against the mischief of anomalies, on a subject of so much importance, and of such frequent occurrence as the law of descents, will bring back the law to the point on which all the former cases seem to have received their decision; namely, that the same person cannot have the estate and the condition, the estate and the title, the land and the rent, the land and the common; nor, consequently, the estate, and the possibility by which the estate is to be defeated; and it is material that the Chief Justice of the King's Bench admitted that it was a matter of indifference in what way the law had been *originally* decided, in *Goodright v. Searle*, which he considered as having settled this point.

It is to be lamented that the point of title had not arisen on the effect of a will

by a person who had at one and the same time, the estate and the possibility, under a gift to him as the survivor of several persons, and who made his will before he became the survivor. It may reasonably be expected that the judges would support the will against each class of heirs; and it would be difficult to understand on what ground, if the late decision be right, they could support the will against the heirs claiming under the possibility, as distinct from the estate (u); since a fee to vest in the survivor of several persons is not, while in contingency, considered to be, indeed is now decided not to be, a devisable interest. The law has in no case ever treated an estate, and the right to an estate, as two distinct interests in one and the same person, at one and the same time, except for an instant, when the law, by its own operation, does, under the learning of *remitter*, substitute the right in the place of the estate; and treat the party as seised by force of his rightful interest, and not by force of the estate acquired by wrong.

If it should be alleged that these limitations in *Goodright v. Searle*, and in the cases of *Doe v. White*, were by executory devise, and that executory devises have introduced a new species of interest by way

(u) *Doe v. Tomkinson*, 2 Maule and Selwyn, 165.

of remainder, though these interests are not remainders in the strict sense of the term; the answer seems to be, that the different interests have qualities well known to the rules of the common law; and that the rules of the common law are equally applicable to interests created by executory devise, as if they had been created by any other mode, or had resulted from any other rule or consequence of law. It was the wisdom and part of the plan, of those who introduced and encouraged the law of executory devises, to assimilate the interest by executory devise, to corresponding interests arising by any other means. Thus possibilities under executory devises were releasable in the same manner as all other possibilities were releasable; and as they were releasable by the act of the parties (a), it is difficult to comprehend for what reason they should not, like all other possibilities, be releasable by act of law; by union, and consolidation with the estate to which they formed a collateral interest, and to which they gave a collateral or determinable quality. In short, it is impossible to pursue the learning and the principles on which the law of *merger*, the law of *extinguishment*, and the law of *remitter* are severally ground-

(a) *Lampett's case*, 10 Rep. 46. *Matthew Manning's case*, 8 Rep. 94.

ed; and not to feel that the case of *Goodright* and *Searle* is one of those unfortunate decisions which trench on first principles, and break down one of those barriers by which consistency of principle, decision, and opinion are secured: and that it leads to doubts on many points, which without such a decision could never have been questioned with any semblance of reason.

While on this subject, it may be worth attention to notice the case of a gift, attended with these circumstances:—

A person being seised in fee by descent under an estate-tail, to his father and mother, suffered a common recovery, and acquired the fee: he was therefore seised of the fee in the course of *descent* from his father and mother. It is not, as far as the fact can be traced, decided by any book, whether the course of descent was to be from the mother, who was the surviving parent, or first from the father, and secondly from the mother. On the principles of equity from which we derive the descendible qualities of the use or estate, it should seem, that the heir of the father, in the first place, and afterwards the heir of the mother, would be admitted into the succession; but a title attended with these circumstances cannot be safely accepted until it shall have undergone the ordeal of judicial decision.

To resume the subject from which there has been a digression.

1st, Every particular vested estate is capable of enlargement. Therefore the estate of tenant for years (*c*), for life, and either for his own life or *pur autre vie* (*d*), or *in tail* (*e*), and either in his own right, or in the right of his wife (*f*), or even, it is apprehended, of a testator; and even the estate of a tenant at will (*g*), or of a copyholder (*h*), or, according to the better opinion, of a *cestui que trust*, holding at the will of the trustees (*i*), or of a mortgagor holding at the will of a mortgagee, of tenant by *statute merchant*, *elegit*, or the like (*k*), may be enlarged by release. But tenant *at sufferance* has no estate, nor is there any privity remaining; and as a consequence, he is not capable of a release to operate in enlargement of an estate (*l*). In short, a person who merely has the possession, or holds by sufferance, is inaccurately denominated a tenant. *Tenants* in dower and by curtesy, being those husbands and wives who have actual estates, are capable of such release. They have a

(c) Litt. a. 459, 465.

(d) Co. Litt. 273, b.

(e) Shep. Touch. 323.

(f) Co. Litt. 273, b. 299, a.

(g) Litt. 460.

(h) Watkins's Copy. 36, a.

(i) Litt. 462, 463, and the Commentary. 2 Ventr. 328.

(k) Co. Litt. 270, b. 273, b. Shep. Touchst. 322.

(l) Co. Litt. 271. *Butler v. Duckmanton*, Cro. Jac. 169.

Note.—The authorities which are cited, merely afford a principle, and are not directly in point.

notoriety of possession, and privity of estate with the releasor. Each of these tenants has an estate of freehold. It is at the same time observable, that before the title of dower is perfected by execution or endowment, the dowress has not any estate (*m*), she has merely a title of dower. That title may, by way of extinguishment, be released by the dowress; but while she has any interest short of an estate, she is not, in respect of such interest, capable of a release: nor can she convey by lease and release till she becomes tenant. In other words, till she has an estate in dower: She may release her right or title of dower to the terretenant, and such release operates by way of extinguishment, and not of conveyance, and a lease and release may operate in this mode. Tenant by the curtesy has an estate immediately on the death of his wife, without any further ceremony, provided the seisin of his wife continued in him and his wife in her right till her death (*n*). It is also agreed that a release to a tenant in tail may operate by way of enlargement (*o*), or more accurately speaking, by way of accession of estate, because the two estates will not unite.

(*m*) Gilbert on Tenures, 26.
Roe v. Power, New Rep. 1.
 And that there must be an estate upon which the release is founded, see Co. Litt. 273, a.

(*n*) Litt. s. 394. and the Commentary.

(*o*) 2 Roll. Abr. 400. Shep. Touch. 322.

The effect of a release is in most cases to occasion a merger or the particular estate to be enlarged, when the estate to be enlarged, and the estate granted by way of enlargement, are immediate to each other. But the grant to a tenant in tail of an immediate estate, will not operate to enlarge the estate-tail as against the issue. This proves that it is not a necessary circumstance to the operation of a release, that it should occasion the absolute merger of the particular estate intended to be enlarged, or the union or consolidation of the two interests.

Notwithstanding the acceptance of the release, the estate-tail will in point of right, and perhaps, indeed probably, in point of estate, remain a distinct interest, on the same principle that an estate-tail will remain a distinct interest, so long as the heirs in tail are within the protection of the statute *de donis*, although the tenant in tail acquires the fee by the original grant, or by subsequent purchase or descent (*p*). From subsequent observations it will also be collected, that there are other instances in which the release may have full effect, without causing the *merger* of the particular estate intended to be enlarged. These cases more fully prove that the release is, in point of

(*p*) *Wiscot's case*, 2 Rep. *Symonds v. Cudmore*, 4 Mod. 1.

law, no more than a grant to a person, having a particular estate; and that it takes its denomination from the connection and privity between the parties to the conveyance, rather than from any peculiar operation.

Littleton's reasoning, as applied to a release to a tenant for years, or at will, pervades the whole series of cases; and ought to have been introduced into the division which shews the origin and foundation of this assurance.

The material sections of Littleton are in these terms :—

Litt. s. 459. “ Also if a man letteth to
 “ another his land (*q*) for term of years, if
 “ the lessor release to the lessee all his
 “ right, &c. before that the lessee *had*
 “ *entered* into the same land by force of the
 “ same lease, such release is void, for that
 “ the lessee had not possession (*r*) in the
 “ land at the time of the release made, but
 “ only a right to have the same land by
 “ force of the lease; but if the lessee *enter*
 “ into the land and hath possession of it (*s*),
 “ by force of the said lease, then such release
 “ made to him by the feoffor (*t*) or by his
 “ heir, is sufficient to him by reason of the

(*q*) Being in possession must
 be understood.

(*s*) And consequently an estate.

(*r*) A vested estate.

(*t*) Should be by the lessor.

“privitie, which by force of the lease is
“between them, &c.”

Sec. 460. “In the same manner it is,
“as it seemeth where a lease is made to a
“man to hold of the lessor at his will, by
“force of which lease the lessee hath pos-
“session: if the lessor, in this case make a
“release to the lessee of all his right, &c.
“this release is good enough for the privity
“which is between them; for it shall *be in*
“*vain to make an estate by livery of seisin*
“to another, where he hath possession of
“the same land by the *lease of* the same
“man before, &c.”

Sec. 461. “But where a man of his own
“head occupieth lands or tenements (*u*), at
“the will of him which hath the freehold,
“and such occupier claiming nothing but at
“will, &c. if he which hath the freehold will
“release all his right to the occupier, &c.
“this release is void, because there is no
“privitie between them by *the* (*v*) lease
“made to the occupier, nor by other man-
“ner &c. (*w*).”

(*u*) Claiming to hold the
same.

(*v*) Read “a.”

(*w*) This doctrine is correct
in principle, but questionable in
its application to the fact; for
why may not a man claiming to
be tenant at will become tenant

at will by the admission of the
owner, and his consent to treat
him as tenant? And why is not
the release to the occupier evi-
dence of such consent that he
holdeth at will? Besides, if
the occupier doth not hold as
tenant, he must in construction

An estate for life is also capable of enlargement. In short, every particular estate, conferring the necessary circumstance of privity, may be enlarged by release. Thus an estate after *possibility of issue* extinct; an estate for years (*x*); and even at will (*y*), may be enlarged by release; and it is agreed that the estate of a *copyholder* (*z*) who holds at the will of the lord, according to the custom of the manor, is an interest which admits of enlargement, by release from the lord. The release converts the copyhold interest into a freehold tenure.

Littleton (*a*) propounds the question whether a *cestui que trust*, who holds by the permission of the trustee, and who is a *quasi* tenant at will only, and not a tenant at will, is capable of receiving a release by way of enlargement. Between these parties there is not any privity, no tenancy. In case there was a tenancy, a distress might be taken by the trustee on the *cestui que trust*; but no distress can be maintained unless there be a tenancy by express con-

of law be viewed as disseisor, and as disseisor he is capable of a release in extinguishment of the right. Co. Litt. 271. See also the case, cited *infra*, from Mr. Wightwick's Reports.

(*x*) Litt. 459, 465.

(*y*) Litt. 460.

(*z*) Watkins's Copyhold, 367, and observation, *supra*.

(*a*) Litt. 462, 463.

tract between the parties. The sections of Littleton are in the following words:

Sec. 462. "Also if a man enfeoffe other
" men of his land, upon confidence and to
" the intent to perform his last will, and
" the feoffor occupieth the same land at the
" will of his feoffees, and after the feoffees
" release by their deed to their feoffor, all
" their right, &c. this hath been a question,
" if such release be good or no. And some
" have said that such release is void, because
" there was no privitie betweene the feof-
" fees and the feoffor, insomuch as no
" lease was made after such feoffment by
" the feoffees to the feoffor to hold at their
" will, and some have said the contrarie, and
" that for two causes."

Sec. 463. "One is, that when such feoff-
" ment is made upon confidence to perform
" the will of the feoffor, it shall be intended
" by the law that the feoffor ought presently
" to occupy the land at the will of his feof-
" fees, and so there is the like kind of pri-
" vitie betweene them as if a man make
" a feoffment to others, and they imme-
" diately upon the feoffment, will and grant
" that their feoffor shall occupy the land at
" their will, &c."

Sec. 464. "Another cause they alledge
" that if such land bee worth fortie shillings
" a yeare, &c. then such feoffor shall be
" sworn in assize and other inquests in plees

“ reals, and also in pleas personals, of
 “ what great sum soever the plaintiff will
 “ declare, &c. and this is by the common
 “ law of the land. *Ergo*, this is for a great
 “ cause, and the cause is for that the law
 “ will, that such feoffors and their heirs
 “ ought to occupie, &c. and to take and
 “ enjoy all manner of profits, issues, and
 “ revenues, &c. as if the lands were their
 “ own, without interruption of the feoffees,
 “ notwithstanding such feoffment. *Ergo*, the
 “ same law giveth a privitie between such
 “ feoffors and the feoffees upon confidences,
 “ &c. for which causes they have said that
 “ such releases made by such feoffees upon
 “ confidence to their feoffor or to his heirs,
 “ &c. so occupying the lands, shall be good
 “ enough, and this is the better opinion as
 “ it seemeth.”

And on these sections, Lord Coke observes (b): “ Here is a question moved, and
 “ the reasons of both sides shewed, and as
 “ it hath been observed, the latter opinion
 “ is the better, being Littleton’s own opi-
 “ nion.”

And the case of the trustee and *cestui que trust*, and the case of a mortgagor and mort-
 gagee, may, with great propriety, be re-
 ferred to the same principle. The law on

this point will frequently obviate the objection that there is not any evidence of a lease for a year, as part of a reconveyance by a mortgagee to the mortgagor; or by a trustee to his *cestui que trust*, when the mortgagor or *cestui que trust* has the possession of the land. And a recital of the fact of possession will suffice; and by *parity* of reasoning, the proof of the fact would be equivalent to a recital (c).

It has been doubted whether the estate of tenant by statute merchant, statute staple, and elegit, admits of enlargement by release.

In Rolle's Abridgement (d), there are the following passages:

"If a man has execution of land upon an elegit, it seems that he in reversion for whose debt it is extended, cannot enlarge his estate by a confirmation to him. To hold for life for want of privity between them, for the tenant by elegit comes in by act in law. Contra 31 Ass. 13. admitted."

"So he cannot enlarge his estate by release, to hold for life for want of privity. Contra 31 Ass. 13. admitted."

"If a man sue execution upon an elegit of my land; and after I, who have the reversion in fee, confirm to him his estate,

(c) *Rees v. Lloyd*, Wightwick's Rep. 123.

(d) 2 Roll. Abr. 401.

“ he may after enlarge his estate by release
“ to hold in fee, for the confirmation has
“ created a privity between them. 31 Ass.
“ 13. admitted.”

And in Mr. Sanders’s valuable Treatise on Uses and Trusts (e), we find this passage :

“ A release of this kind (that is, a re-
“ lease enlarging an estate), will not operate
“ upon the possession of an under-lessee,
“ or of a tenant at sufferance, by elegit or
“ statute merchant.”

And these passages seem to justify the opinion that the estate of a tenant by statute, &c. is not capable of enlargement, except a privity has been created, by means of a confirmation to the tenant, of his interest under the extent. The passage in the book of *Assizes*, to which reference is made, certainly warrants the opinion, that the estate under the elegit was merged or extinguished, or rather enlarged by the release.

The case in the Book of Assize is long and complicated. Its substance and effect, however, are very neatly and correctly summed up by Brooke, in the following terms :

“ Where there is a tenant by elegit, and
“ the tenant of the freehold charges the
“ lands with a rent, after execution had by

(e) 2 Vol. p. 59. Edit. 1813.

“ extent, and afterwards the tenant of the
“ freehold confirms the estate of tenant by
“ *elegit*, for term of his life, *or releases* to
“ him all his right, now the tenant shall
“ hold charged, where he held discharged
“ before; for now he is in, of the estate
“ of freehold, where he had but a chattel
“ before; and so in of another estate, and
“ in by the tenant of the freehold, who
“ charged where he was in by the law (a)
“ before.”

And it is observable that unless this release operated by way of enlargement, the release, as such, could not have been good, because the freehold could not have passed without livery of seisin, or without attornment. The grant was good only because it was made to the person who had the possession by force of the execution upon the *elegit*.

Nor is it against the authority of the passage in Brooke which has been cited, that Brooke, under the head Charge (b), and “ Extinguishment (c),” refers the decision to confirmation; for such confirmation must have operated by way of enlargement, and a confirmation in enlargement is referable to the same rules of law as a release in enlargement.

(a) Viz. under the *elegit*.

(b) Bro. Charge, 29.

(c) Bro. Extinguishment, 30.

The commentary of Lord Coke (d), is sometimes cited to support the opinion that the estate of these tenants by statute merchant, &c. &c. does not admit of enlargement. So far, however, from Lord Coke's sanctioning this deduction, there is an express admission by him that the estate of these tenants may be enlarged. In one passage his Lordship (e) observes: "So it is if a release be made to tenant by statute staple, or merchant, or tenant by elegit, as hath been said, and so likewise to guardians in chivalrie, which holdeth in for the value by him in the reversion of all his right in the land: by this a freehold passeth for the life of him to whom the release is made, for that is the greatest estate that can pass without apt words of inheritance."

In another passage (f), Lord Coke virtually admits that the *estate* of tenants by statute merchant, &c. may be enlarged when it is completely executed, though it cannot be enlarged while it remains like an *interesse termini*, in an executory and imperfect state; and Sheppard in his Touchstone (g), assumes it as a clear proposition, that estates of this description, are, like

(d) Co. Litt. 315, b.

(f) Co. Litt. 270, b. & Vent.

(e) Ib. 273, b.

238.

(g) Shep. Touch. 321.

other vested interests, capable of enlargement. The passage in the Touchstone is in these terms :—" The releasee must be *lessee* for " life, years, or tenant by statute merchant, " staple or elegit, or as guardian in chivalry, " that doth hold over for the value, or at least " must be tenant at will."

Indeed, it would be singular if the estate of tenant by statute merchant, &c. might not be enlarged by release. The estate confers a vested interest. It changes the relative situation of the debtor, or other person against whom the execution is levied. Instead of having an estate which confers a right to the possession, to be aliened by feoffment, or other act proper to transfer a seisin coupled with the possession, the reversioner has an estate or interest lying in grant, of which no alienation could be made at the common law to a stranger without a deed of grant, and the attornment of the particular tenant. What impediment then is there, in point of law or in principle, to the right of a tenant by statute merchant to receive such grant without the ceremony of attornment, since his acceptance supplies the place of that ceremony? It would be difficult to find any legal objection against the validity of such grant, even were attornment necessary at this day in the same manner as it was formerly. However, it

is admitted that the case stands on the same ground, and must be decided by the same principles now, when the necessity of attornment is superseded, as it must have been decided at the common law; when attornment was essential to the validity of a grant to a stranger, by the owner of a reversionary estate. To support the proposition that a tenant by elegit, or statute merchant, is not capable of a release, to operate by enlargement, it is said (*h*), that to make releases operate in this manner, it is necessary that the releasee, at the time the release is made, should be in the actual possession of, or should have a vested interest in, the lands intended to be released: that there should be a privity between him and the releasor, and that the possession of the releasee should be notorious. It is difficult to understand how it can be made out in point of fact or of law, that any one of these qualifications is wanting in a tenant by statute or elegit. No one controverts his right to a vested interest after an execution has been sued, and the possession delivered by the sheriff, and the writ of execution has been returned. That there is also privity of estate, may be inferred from the acknowledged doctrine that a forfeiture may be incurred by the tenant

(*h*) Co. Litt. 273, note 1.

of this estate by making a feoffment, levying a fine, &c. (i) and that a surrender by the tenant by statute merchant, &c. to the reversioner will be available (k). And Lord Coke has admitted (l), that if a man extend land by force of a statute merchant, staple, recognizance, or elegit, he leaveth a *reversion* in the conuzor.

A case in Rolle (m), also admits that the estate of this tenant may be confirmed, and after confirmation there may be enlargement. To admit that the estate of tenant by statute merchant, &c. may be confirmed, is, in principle, to admit that it may be enlarged by release; for releases by way of enlargement, and such confirmations, depend upon the same principles of tenure. But it may be objected that this is true only as applied to releases and confirmations, when the object of such assurance is to enlarge an estate, and that a confirmation of *title* differs from a confirmation by way of enlargement of estate. The objection depends upon a refined distinction. Even though confirmation of title were essential, (a point which, however, is not conceded), it would be more consonant with that liberality, or rather to that just applica-

(i) Moor, 663.

(l) Co. Litt. 250, b. 315, b.

(k) Corbett's case, 4 Rep. 82, b. 2 Vent. 328.

(m) 2 Roll. Abr. 401. pl. 14.

tion of principle, which ought to govern the decisions of courts of justice, and even to the authorities with which the books abound, that the release, rather than fail of effect, should have the twofold operation, first, of a confirmation; and secondly, of a release. It remains only to shew that there is no want of notoriety: Why is not an entry by virtue of an execution, as notorious as an entry by virtue of a lease? After the demandant in a real action has obtained seisin under an execution, the tenant in the action, or a stranger, may release to him. The validity of such release is grounded on the seisin, or estate, of the releasee. The same principles establish the right of the tenant by statute or elegit, to receive a grant or release, in enlargement of his estate, from the person whose possession is, by force of the execution, changed into a reversion: thus establishing the relative situation of a tenancy and seignior, between these parties: and it is incomprehensible on what ground the law should acknowledge the right of the tenant to surrender to the reversioner, and deny the right of the reversioner to make, or the tenant to receive, a grant or release in enlargement of the estate of the tenant. At the common law the debtor could not after execution, have conveyed to a stranger by feoffment, without the

consent of the tenant by *elegit*, &c. for the possession was in this particular tenant, and not in the debtor: hence the doctrine of Lord Coke (n),—"A tenant by statute merchant, or tenant by statute staple, or by *elegit*, must also *attorn*, for the grantee may have a *venire facias ad computandum*, or tender the money, &c. and discharge the land. And if the reversion be granted by fine, they shall be compelled to attorn in a *quid juris clamat*."

If it be said that the tenant by statute, &c. comes in by act of law, or in the *post*, and not by privity of contract, the same objection would exclude a tenant in dower or by curtesy from taking a release in enlargement of the estate of that tenant, while it is an acknowledged proposition, that such tenant in dower, or by the curtesy, has an estate which may be enlarged by release.

As illustrative of this doctrine of privity, and as introducing a point, even applicable to the learning of releases, the succeeding passage may be added, namely:

"And so the executors that have the land until the debts be paid, must attorn upon the grant of the reversion, although they have not any certain term of years (o)."

(n) Co. Litt. 315, b.

(o) Co. Litt. 315.

And it may, therefore, be predicated of the tenancy of such executors, that their interest admits of enlargement by release; nor would it be right to suffer the passage from Lord Coke respecting the *venire facias ad computandum*, to find a place in this work, without observing that it affords an authority, that no one can purchase an estate held by statute or elegit without considering this interest to be redeemable by the reversioner, even at law, on payment of the balance of the debt, *after deducting the sums levied, according to the extended value*, and the casual profits. In equity, except in cases in which the account is involved in difficulty from lapse of time, the account must be taken on the footing of the actual receipts, by the tenant by statute merchant, &c. (p).

From these observations, on the privity between the tenant by statute merchant, &c. on the one hand, and on the other hand, the person who has the ulterior interest, it follows, that a grant was the proper mode of transferring the reversion of the debtor to a stranger or third person; and as the debtor might grant the reversion to a stranger by deed, without livery of seisin, why might he not grant his estate to the te-

(p) *Marsh v. Lee*, 2 Vent. 136. *Ess. on the Quant.*
 338. *Audely v. —*, Hard. of Est. chap. Terms of Years.

nant by statute elegit, &c. Such grant to the tenant must, on principle, assume the name of a release, since it has all the qualities of that species of assurance.

The sole object of these observations is to lead to a certain knowledge of the principles on which the release is grounded; and to endeavour to establish the general proposition, that every particular estate may, if properly circumstanced in other respects, be enlarged by the release of the person who has an estate in reversion or remainder.

All the books agree that when there is a *mere possession*, without any estate, a release cannot operate with effect. A person holding by sufferance, or a *mere trespasser*, has a mere naked possession, and no estate; and this is the condition of a person who intrudes and claims to hold at will, but is not *admitted* to be tenant at will: and a release to him could not operate with effect in that mode. He has no estate or interest capable of enlargement^(g). And had not the authority of Littleton interposed and received the sanction of Lord Coke^(r), there would have been considerable difficulty in admitting that a *certain que* trust of the fee, who had the possession

(g) 1 Inst. 270, b. 271, a. 464, and the commentary.

(r) Litt. a. 467, 468, and

merely by the permission of the trustee, was qualified to receive a release, as an enlargement of his estate or interest under a permissive occupation. It is decided, that a mortgagor cannot, without an express contract be charged with the payment of rent to the mortgagee, nor with a liability to rent in an action for use and occupation (a).

This case put by Littleton, in section 461, is the general authority that a *mere trespasser* or a mere occupier, though he may claim to hold at will, has no estate; and that without an estate creating the relative situation of tenant, or *quasi* tenant, and lord or reversioner, there cannot be an effectual release by way of enlargement. At the same time that this section is urged and its principle acknowledged, it is, as already noticed, rather a subject of surprise, that the law had not accepted the conduct of the parties, as evidence that the occupier consented to be tenant at will, and that the owner of the inheritance agreed to this tenancy, considering the release as the evidence and acknowledgment of the tenancy, and as the only means by which the release could be effectual by way of conveyance; and in modern practice no reasonable doubt can be entertained that under such circumstances the law would consider the

(a) The contract is to pay interest and not to pay rent.

occupier, or the occupier by sufferance, as tenant at will.

This, indeed, is the law, as may be collected from Lord Coke (s) in his commentaries on Littleton, Sec. 461. though that part of the commentary, which applies the text to a tenant at sufferance, seems to be mistaken. The translation of the text inserting *the lease for a lease*, might easily have led to this mistake. Lord Coke's comments are in these terms. "De sa teste demesne occupia. Hee doth not say, de sa teste demesne *enter*, &c. so as this is to be understood of a tenant at sufferance, viz. where a man cometh to the possession first lawfully and holdeth over." And then Lord Coke gives the contrast in the following passage. "For if a man entreth into land of his own wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but he is a disseisor (t), and then the release to him is good (v): or if the owner *consented* thereunto, then he is a tenant at will, and that way also the release is good (w). But there is a diversitie when one cometh to a particular estate in land by the act of the

(s) 1 Inst, 271.

(v) By way of release of right

(t) At the election only of the rightful owner.

(w) Operating in this instance as a release in enlargement.

“partie, and when by act in law; for if
“the guardian hold over, he is an *abator*,
“because his interest came by act in law.”

Besides, since these observations were written, there is a decision which enforces this point (*x*). As this decision will be a leading authority for future practice, in the advice to be given by counsel on titles; and as a frequent reference will in the sequel be made to this decision, a full abstract of the case and opinion of the court in pronouncing judgment shall be subjoined.

In *Rees, on the demise of Chamberlain, v. Lloyd*, by an indenture, bearing date August the 27th, 1786, made between the defendant on the one part, and the lessor of the plaintiff on the other part; “the defendant
“did demise, lease, grant, set and to farm
“let to Chamberlain all that messuage, &c.
“situate in the parish of St. Martin’s, in
“the county of Pembroke, late in the oc-
“cupation and tenure of — Phillips and
“his undertenants,” and now in the *occu-
pation and tenure* of Chamberlain and his undertenants; habendum to Chamberlain for three lives, at the yearly rent of 80*l*. The lessor of the plaintiff continued to occupy the premises so demised, till the fourth day of May last, when possession was given to the defendant by the sheriff, under

(*x*) *Rees v. Lloyd*, Wightwick, 123.

a writ of possession, in consequence of a judgment recovered by him at the spring great sessions for the county of Pembroke, and this ejectment was brought to regain the possession of the premises.

Upon the trial at the last assizes for the county of Hereford, the lessor of the plaintiff put in the above lease, upon which no memorandum of livery of seisin was indorsed. For the defendant, it was contended that the lease was a freehold lease, and livery of seisin was therefore necessary to perfect it; and Lawrence, Justice, before whom the cause was tried, being of that opinion, the lessor of the plaintiff endeavoured to prove it by the evidence of Peter Axton; who said, "that he applied to the defendant in the year 1786, for the lease of the lands in question, who told him that he should have it, if the lessor of the plaintiff would be bound for him; he afterwards carried a letter from the lessor of the plaintiff to the defendant, who upon reading it, said he had the choice between the witness and the lessor of the plaintiff; and he accordingly chose the lessor of the plaintiff: the lease was prepared and granted, and I took possession: the lessor of the plaintiff told me he supposed I was to occupy, and I did so occupy accordingly; the defendant made no objection. I have paid rent to the

“lessor of the plaintiff many times, and
“taken his receipts; the lessor of the plain-
“tiff was in possession of five fields for two
“years; I had the whole for eleven years;
“I took possession of the whole at first;
“he gave me permission to look after his
“land; he had other land, he had no other
“possession, except by my looking after it;
“the lease was given to me, and I afterwards
“gave it to the lessor of the plaintiff: this
“was three years after I was in possession.
“Mr. Chamberlain sent me to a gentleman
“at Pembroke, from whom I had it.”

Lawrence, Justice, upon this evidence observed, that it was impossible for him to presume against the fact proved, and reluctantly directed a nonsuit.—A rule having been obtained, calling upon the defendant to show cause why the nonsuit should not be set aside, and a new trial granted; the case was argued, and the court being desirous that it should be considered whether it was necessary for the lessor of the plaintiff to prove livery of seisin, in the present case, the argument was ordered to stand over; and Thompson, Baron, said, that he wished it also to be considered, whether the livery of seisin could be presumed within the time at which it ceases to be necessary to prove the execution of a deed.

The case came on for a second argument, when it was fully argued, and after an ob-

servation from Wood, Baron, that *mere permission to occupy was a lease, and has been determined to be so* (y)—

Macdonald, Chief Baron, gave the judgment of the court to this effect:—"The nonsuit in the present case is sought to be set aside upon two grounds: first, that it ought to have been left to the jury, under the circumstances, to presume livery of seisin; and secondly, that livery of seisin was altogether unnecessary. Upon the first point, it was contended by the one side that livery of seisin ought not to be presumed under thirty years, the period at which it becomes unnecessary to prove deeds; by the other side, that it ought to be presumed after the expiration of twenty, as possession for that length of time would bar a possessory action: I own, for myself, I think twenty years the best analogy. The learned judge who tried this cause, thought that all grounds of presumption, in favour of livery of seisin having taken place, were removed by the evidence: now, it appears from the evidence that Axton was a candidate for the lease, that he was rejected, and the lease granted to the lessor of the plaintiff; Axton thereupon takes possession as his under-tenant; but there is nothing in all this to preclude the

(y) See 1 Inst. 271, cited *supra*, accordingly.

“possibility of livery of seisin having
“been made to the lessor of the plaintiff,
“though there is sufficient to presume that
“Axton himself had none. Then it is allow-
“ed, that the necessity for livery of seisin
“was superseded, if there was any posses-
“sion under the defendant; and to show
“such possession, the words of the lease are
“referred to, stating that the lands ‘were in
“the tenure and occupation of Chamberlain
“and his undertenants.’ Now Lord Coke,
“Co. Lit. 352, b. says, indeed, ‘neither
“doth a recital conclude, because it is no
“direct affirmation;’ but from Rolle’s
“Abridgment, 872, it would appear that
“there is a distinction between a general and
“a particular recital: and though a general
“recital will not work an estoppel, yet the
“recital of a particular thing will have that
“effect: and here is a particular recital.
“Taking all the circumstances of this case
“into our consideration, we are all of opi-
“nion that this nonsuit should be set aside;
“I myself for the reason I have now stated :”
and the rule for a new trial was made absolute.

To resume the subject. Since Littleton wrote his invaluable Treatise on Tenures, there have been successive decisions, all tending to the conclusion, that the acts of parties shall be construed in such manner that they may be operative rather than fail of effect: thus a lease by tenant for life,

and by a remainder-man in fee, is in the first place the lease of the tenant for life, and the confirmation of the remainder-man, and after the death of the tenant for life, is the lease of the remainder-man and the confirmation of the tenant for life (z). So, a feoffment by a tenant for life, and a remainder-man by *deed*, is the feoffment of tenant for life, and the conveyance or confirmation of the remainder-man, since the remainder may pass by the operation of a deed as a grant: but a feoffment of the same person *without deed*, is the feoffment of the remainder-man, and the surrender of tenant for life, inasmuch as the remainder could not pass from the remainder-man for want of a deed of grant, unless it passed by the operation of the livery (a).

Instances of this sort might be multiplied to any extent. The point, however, which seems most relevant, is that which concerns the doctrine of feoffments. A man who enters, claiming under a void feoffment, or a void grant, is considered as entering by disseisin (b); as the only means of giving an incipient title, to become a complete title eventually under the doctrine of descents which toll entries, warranties, and the like; or the more

(z) 1 Inst. 45, a.

(a) *Bredon's Case*, 1 Rep 76.

(b) Litt. sect. 70.

modern doctrine by which the title may be rendered complete under the operation of a fine and non-claim, or under the statute of limitations. As often as a man enters with an intention to receive livery of seisin, he must be in possession, either by trespass, or by disseisin, or without any wrong; and as an adverse possession in him would intercept and defeat the right of the owner to make a feoffment without first ejecting the intended feoffee, the law treats the intended feoffee as neither tenant, disseisor, nor *possessor*. It assumes that his possession is the possession of the real owner, the intended feoffor, or is merely a permissive occupation.

Nor would it be right to dismiss the section of Littleton, which has called forth these observations, without remarking that the rightful owner might have treated the person thus claiming to occupy at will as a trespasser, or as a disseisor at election; for every person who enters wrongfully is necessarily a trespasser, and the freeholder may at his election treat the trespasser as a disseisor (c); and as the trespasser cannot qualify his own wrong (d), every disseisin, (except, perhaps, as already stated, the particular and special case of a disseisin of the tenant of a particular estate, under a claim

(c) *Blunden v. Baugh*, Cro. Car. 302.

(d) Inst. 271, a.

of his estate only,) is necessarily a disseisin of the fee-simple, and the disseisor is capable of a release from the disseisee in extinguishment of the right. Littleton must be read merely as putting a particular case, with special circumstances, and drawing his conclusion upon these circumstances, and for the sake of illustrating his doctrine by a distinction: and the case must be judged of by the facts as stated, without giving to them a new or different application, allowing any of the inferences or presumptions of law. In this view of the case, the point of Littleton is correct, that a man who has merely the occupation of lands, without any estate, is not capable of a release.

The context of Littleton sufficiently demonstrates, that in the section which has given rise to these observations, the author was treating of the possession of a wrong-doer, and not of a *tenant by sufferance*.

Another point to be collected from the same section is, that no one can, by claiming to hold at will, become tenant at will without the consent and acceptance of the owner, for the tenancy must be at the will of both parties (*e*):

(*e*) 1 Inst. 55, a.

The text of Littleton is also full and explicit on the point, that a person who has merely a *right of entry* or of *action*, is not capable of this species of assurance. The language of this text writer (*f*) is, "If a lease be made to one for a term of life, reserving to the lessor and his heirs a certain rent; if the lessee be disseised, and after the lessor release to the lessee and his heirs, all the right which he hath in the land, and after the lessee entereth, albeit in this case, *the rent is extinct*, yet nothing of the right of the reversion shall pass." The rent will be extinct, because of the privity of contract, for the rent is payable notwithstanding the disseisin, since there is not any eviction under an elder title: but the disseisin of the lessee is a disseisin of the lessor, so that the lessor has no estate to grant, nor the lessee any estate capable of enlargement.

It may in this place be noticed, that *every general disseisin acquires a fee-simple by wrong*. Hence Lord Coke (*g*) has this passage: "A man disseiseth tenant for life, to the use of him in the reversion, and after he in the reversion agreeth to the disseisin, it is said, that he in reversion is a disseisor in fee; for by the disseisin made by the stran-

(*f*) Litt. sect. 456.

(*g*) 1 Inst. 180, b.

“ger, the reversion was divested, which, say
 “they, cannot be revested by the agreed-
 “ment of him in the reversion: for that it
 “maketh him a wrong-doer, and therefore
 “no relation to an estate by wrong can help
 “him.” Lord Hobart (*h*) accounts for this
 point of law by these observations: “A
 “grant to *I. S.* and his heirs during the life
 “of *I. D.* is no fee, but a special occupancy,
 “as is resolved in *Chudleigh’s case*; but a
 “disseisin of an estate for life, by neces-
 “sity in law, makes a *quasi fee*, because
 “wrong is unlimited, and ravins all that
 “can be gotten, and is not governed by
 “terms of the estate, because it is not con-
 “tained within rules.”

When a lessor disseises his lessee, the lessor, it is true, is a disseisor; but if he conveys the fee, the lessee for life may restore his seisin, without defeating the estate which has been conveyed, to any greater extent than for the life-interest (*i*).

According to the authorities collected from Lord Coke’s Commentary, and from Lord Hobart’s Reports, every disseisin, even under a claim of a particular estate, must necessarily be a disseisin or divesting of the estate of the reversioner or remainder-man; and yet it is acknowledged as a

(*h*) Hob. Rep. 333.

(*i*) 1 Inst. Cl. Confirmation.

proposition of law, that one man may enter claiming the term of years of another person, without divesting the reversion (*k*); and it should seem on principle, that a disseisin of a tenant for life, or of a tenant in tail, merely claiming *his estate*, would not be a disseisin of the reversioner or remainderman, except at his election. He may, perhaps, for this is doubtful, elect to be disseised, by denying any privity between him and the disseisor, and treat the disseisor as a wrong-doer, and not as his tenant. On the other hand, what reason is there against his acceptance of the new tenant? It is agreed, that a disseisin of the tenant for life of the King, is a disseisin for life only (*l*). The ground of this point is, that the King cannot, on account of his prerogative, be disseised: and therefore, if the King's tenant for life be disseised by two, and he releaseth to one of them, the releasee shall hold out his companion; for the disseisor gained but the estate for life (*m*). And the next observation of Lord Coke is still more material, when he adds (*n*), "So if *joint-tenants* make a lease "for life, and after do disseise the tenant "for life, and he release to one of them,"

(*k*) See *infra*, 3 Lev. 35.

(*m*) 1 Inst. 276, a.

(*l*) 1 Inst. 276, a.

(*n*) *Ib.*

(the releasee) "he shall hold out his companion; for the disseisin was but of an estate for life."

The next proposition in Lord Coke(o), is, "If tenant for life be disseised by two, and he in the reversion, and tenant for life join in a release to one of the disseisors, he shall hold his companion out; and yet it" (the release) "cannot enure by way of entry and feoffment. But if they severally release their several rights, their several releases shall enure to both the disseisors." In this instance, the disseisin was of the fee-simple, and not merely of the life-estate. A release by both jointly would give the entire fee-simple; and therefore would annex the right of the fee-simple to the possession: but a release by either, or by each separately, would merely annex the *right of his estate* to the possession, and the possession could not by such release be made rightful: either for the estate for life, distinct from the reversion, or for the reversion distinct from the estate for life; for this would be to make a fraction of interests against the maxims of law; a particular estate without any reversion expectant on that estate; a difficulty which does not occur when a

(o) 1 Inst. 276, a.

tenant of the immediate reversion disseises his own tenant for life; for then it may be said he merely claims and resumes the estate for life; for when there are interposed estates, it is agreed, that a disseisin of the tenant for life, unless it be special, and confined to the life-estate, will be a disseisin to those in remainder and reversion, so long at least, and perhaps, so long only, as the interest under these particular estates shall continue.

It remains only, that a few authorities should be adduced, in proof that there may be an ouster of a tenant for years, merely claiming his estate, without being a *disseisin* of the reversioner; and that there may be a disseisin of a tenant for life, by an entry, claiming his estate, without any disseisin of the reversioner.

The case of *Kirton* against *Birling* and *Trappes* (a), is material to the point now under consideration. In an action of entry in the *quibus* in nature of assize, *Birling* pleaded non-tenure in abatement of the writ. *Trappes* took upon himself the entire tenancy, without this, that *Birling* had any thing on the day of the suing out of the writ, or at any time since; and pleaded a bar, *scil.* the feoffment of one

(a) Dyer, 134, b.

Walker and one *Hylton* to him in fee, and gave colour to the demandant by the same feoffors. The demandant as to the plea of *Birling*, in abatement of the writ, averred him and *Trappes* tenants of the freehold, as the writ supposed; and this he prayed might be inquired of the country, and *B.* did the like. And as to the plea in bar of *T.* he said, that *William Kirton*, his father, was seised in fee, until by the said feoffors disseised, who being then in by disseisin, enfeoffed *Trappes* as above; and afterwards *William* the father died, and the demandant as son and heir, entered upon *Trappes*, and was seised in fee as in his remitter, until by *B.* and *T.* disseised, &c. and made no averment of his plea in the conclusion, "and this he "is ready to verify, &c." To which *T.* rejoined as above in bar, and traversed the disseisin made by the said feoffors upon the father of the demandant, upon which point they were at issue: and at the day when the inquest appeared, the demandant would have relinquished his first issue, because it was unnecessarily joined, since the demandant was not bound to maintain his writ, but might demur to the plea of non-tenure of the one, and answer the bar of the other; and the maintaining the writ was only to the damage of the

defendants ; but notwithstanding this, the court would not permit it. And upon the evidence to prove joint-tenancy, it appeared, that *B.* before entry of the demandant, was termor, or lessee at will, to *T.*, and that he paid rent to him, and that he re-entered upon the demandant, claiming the former estate ; and by the opinion of the court they are *disseisors* and tenants, because the termor cannot qualify his own wrong, &c. And at last a verdict was given for the plaintiff on both issues, &c. and judgment given accordingly. The ground of this case is, that by the re-entry of the disseisee, the lease was avoided, and the subsequent entry of the lessee was tortious to the owner of the inheritance. It was not confined to an *existing estate*, for no estate existed, and for that reason the rightful owner was at liberty to treat the former lessee entering wrongfully, as a disseisor. This decision then does not impugn the point, which it is the object of these observations to establish.

And the case of *the Mayor and Commonalty of Norwich v. Johnson* (b), supports this distinction. In that case, the plaintiffs in an action of waste declared upon " a lease for thirty-one years made

(b) 3 Lev. 35. 3 Mod. 90. S. C.

“ to one *Cooke*, and that he died, and the
“ defendant, being an executor to *Cooke*,
“ entered and did waste. The defendant
“ pleaded that *Cooke* died intestate, and
“ that administration was not granted to
“ him, nor the term assigned to him by
“ *Cooke*, or any administrator of *Cooke*;
“ the plaintiffs replied, that the defend-
“ ant after the death of *Cooke*, entered
“ as executor, and did the waste: upon
“ this the defendant demurred, and it
“ was argued, in support of the demurrer,
“ that one could not be a tort executor
“ of a term, for no man can apportion
“ his own wrong; but if a man enter
“ tortiously, he is a disseisor, and not a
“ termor. And cases were cited that a
“ tortious entry makes the party a dissei-
“ sor in fee, though he claims a particular
“ estate only. But after time taken to
“ consider, judgment was given for the
“ plaintiff, for in the cases cited, there was no
“ particular estate, or term, in esse: and the
“ claim of the tort-fesor cannot create a par-
“ ticular estate, and so apportion his own
“ wrong: but of necessity, he is a disseisor
“ in fee; because there is no particular or
“ other estate in esse. But in the case at
“ bar, there was a *rightful term in esse*, and
“ he in reversion cannot maintain trespass
“ during the term: and therefore, it is rea-

“sonable that he should have his remedy upon the contract, against him that claims to be in by the contract.” And it was said, Moor, pl. 126, “it seems to be admitted that there may be a tort executor of a term.”

This case, with the comment on the former cases, proves that a person who enters, *claiming a term*, where there is such a term, or who enters claiming any particular estate, where there is such particular estate, may become tenant for that particular estate, by the dispossession of the termor, or disseisin of the owner of the particular estate; without divesting the estate of the person, who has the reversion or remainder, or committing any wrong beyond the particular estate.

It is true, that Popham, Chief Justice, did in *Helyar's case* (c), say, “a lease for years cannot be gained but by lawful grant; and therefore, when one claims a lease for years, and the other claims by an elder grant, there he shall traverse the latter grant, but the other party shall traverse the elder grant, or show how he came to it again, to enable the second grant. But it is otherwise in case of a feoffment; for there, if the other party claims by a

(c) 3 Rep.

“ former feoffment, he ought to confess and
“ avoid the latter feoffment as by disseisin,
“ &c. For a *disseisor may gain an estate in fee,*
“ *but none can gain an estate for years, but*
“ *by lawful conveyance*; and so is the differ-
“ ence. And when he claims by a former
“ assignment of a term, it will be imperti-
“ nent to traverse *absque hoc*, that he, after
“ that, assigned his interest; for peradven-
“ ture he assigned all his interest, and yet
“ had nothing therein.”

But this judgment cannot be urged against the decision to be collected from the report of Levinz; for Popham was treating of the *creation* of estates; and it is true that a particular estate cannot be created without a lease, a grant, &c. but nothing advanced by Popham, denies that when there is a *particular* estate actually existing, there may not be an ouster or a disseisin confined to that particular estate, so as to leave the estate of the reversioner or remainder-man, *nolens volens*, a subsisting estate; and admitting the reversion or remainder to be a subsisting estate, then it follows that there is not a disseisin of the *fee-simple*.

The case of the disseisin of the tenant for life of the *king* is material as an authority to this point. And it may be added, that when a tenant *pur autre vie* dies tenant, and

a stranger enters generally, he will, by construction of law, be tenant for the life, thus filling the tenancy for that particular estate.

And it may readily be conceded, that when there is not any particular estate, or when the entry is general without a claim confined, in terms or by the circumstances to the *particular* estate, there will be a disseisin of the fee-simple.

But from all the cases and general principles, it may be collected that there can be a disseisin for a particular estate in those instances only in which there is a particular estate, and the entry is made, claiming that estate; and the lord, it should seem, may make such disseisor his tenant, by acceptance of rent from him; and after acceptance of rent, there are strong grounds for contending that the disseisor would be so connected in privity with the lord, as to be capable of a release in enlargement of his estate, giving the disseisor a good title against the lord, but leaving his title open to be impeached by the rightful owner of the particular estate.

These observations on the effect of disseisin, ouster, &c. of the owners of particular estates, under a claim of their estates, are intimately connected with the learning to be discussed under the next head, viz.

the privity requisite between a releasor and releasee.

Thirdly, Who may be the releasor, and who may be the releasee in respect of privity of estate.

That the release may operate as an enlargement of an estate, three circumstances are requisite.

1st, That the releasee should have a *vested* estate.

2dly, That the releasor should have a *vested* estate in reversion or remainder, expectant mediately or immediately on the estate of the releasee.

3dly, That there should be a *privity* of estate between the releasor and the releasee.

The two first points have been fully discussed under former divisions; and it has been shown that it is not sufficient that the releasee should have a mere inchoate executory interest, as an *interesse termini*, or a contingent remainder, or any other executory interest (*d*), as an interest depending on an executory devise; nor is it sufficient that he should have a *mere right* or title of entry, as a lessee for life, after he has been disscised, or as a lessee for years, after he has been ousted, and while

his interest remains a mere right or title of entry.

On the contrary, it is necessary that the releasor and releasee should stand in the relation to each other, either of *lessor* and *lessee*, or in the relation of a particular tenant and remainder-man, or particular tenant and reversioner, so that there may be a *privity* of tenure between them.

The lessor may enlarge the estate of his lessee; and for all the purposes of this doctrine, the *assignee* or representative of the lessee stands in the place of the lessee; and the assignee or representative, whether *heir* or *devisee*, of the reversioner, stands in the place of the reversioner; and the ability of making, and capacity of receiving such enlargement, continues, although the lessee, &c. or his assignee, create a particular estate, derived out of his own estate; and although the reversioner create a particular estate which is interposed between the interest of the particular tenant and the reversion; for notwithstanding such particular estates, there is a continuing privity between the lessee, or his assignee on the one hand, and the reversioner or his assignee on the other hand; and yet an estate created out of a particular estate is not, *during such particular estate*, capable

of enlargement by release of the remainder or reversion, expectant on such particular estate. This is from the want of privity. The material rule of law applicable to this subject, seems to be, that the particular estates, the remainder and the reversion, are parts of the same estate. There is a connection between the tenants of these estates as having interests depending on one and the same seisin(e).

In order to understand this subject scientifically, and on the principles of law which govern this doctrine, it will be proper to consider the law under the following subdivisions.

1. The general nature of privity between tenants.

2. The cases of immediate privity.

3. The cases of privity, notwithstanding a mesne estate.

4. Cases of privity, because a derivative estate is discharged from its original privity.

5. The cases of want of privity.

- 1st, Because there is mere *privity of tenure*, for the sake of remedy, and not of estate.

- 2dly, Because the estate is assigned.

(e) 2 Black. Com. Ch. Re- Litt. s. 673. *Goodright v. mainders, &c.* 1 Inst. 345. *Forrester*, 1 Taunton, Arg. 602.

3dly, Because there is no estate ; but only a right or interest.

4thly, Because the estate is derived out of a *mesne* subsisting estate.

5thly, Because the estate is *determined*.

After an examination of these points, this division will be concluded with some general practical observations.

Of the general Nature of Privy, between Tenants.

Lord Coke(*f*), treating of privities, observes, “ Privy, in the understanding of the “ common law, is fourfold :

“ 1st, As privies *in estate* ; as between the “ donor and donee, lessor and lessee, which “ privy is ever immediate.

“ 2d, Privies *in blood* ; as the heir to the “ ancestor, or between co-parceners, &c.

“ 3d, Privies *in representation* ; as executors, “ &c. to the testator.

“ And 4thly, Privities *in tenure* ; as the “ lord and tenant, &c. which may be reduced “ to two general heads, privies in deed, and “ privies in law.”

The nature of the privy required, to the validity of a lease and release, is that which

(*f*) 1 Inst. p. 271, 354, b.

subsists between a particular tenant and reversioner, or a particular tenant and the person who has a remainder expectant on the particular estate.

Thus, if *A.* be tenant for life, or for years, with reversion to *B.*: or if *A.* be tenant for life or for years, with remainder to *B.*, the estate of *A.* may be enlarged by a release from *B.* The common assurance by lease and release, is in effect this particular case of an enlargement of an estate for one year, by a grant of the reversion, from the owner of the reversion, to his own lessee, under the lease for a year.

Thus, to qualify a tenant to receive a release, it is not sufficient merely, that he should have the *possession*, or that he should have a *vested* estate: there must be a connection in point of tenancy, or, as the law terms it, a privity between the releasor and releasee: hence the observation, that, "It is a certain rule, that when a release doth enure by way of enlarging of an estate, there must be privity of estate, as between lessor and lessee:" and mere privity, without estate, will not suffice (*g*). "As if an infant makes a lease for life, and the lessee granteth over his estate with

(*g*) 1 Inst. 273, 372, b. See Shep. Touch. C. Rel. 322.

“warranty, the infant at full age, bring-
“eth a *dum fuit infra etatem*, the tenant
“voucheth his grantor, who entereth into
“warranty, the demandant releaseth to
“him and his heirs: here is privity in
“law, and a tenancy in supposition of
“law: and yet because he, *in rei veritate*
“hath no estate, it cannot enure to him
“by way of enlargement; for how can his
“estate be enlarged, that hath not any?
“If the tenant by the curtesy grant over
“his estate, yet he is tenant as to an ac-
“tion of waste, attornment, &c. and yet a
“release to him and his heirs cannot enure
“to enlarge his estate, that hath no estate
“at all.”

It follows, that in order that an estate may be enlarged, there must, as between the releasor and releasee, be privity of connection, and privity of estate, as is the case between lessor and lessee, donor and donee(*h*); or between the person who has a particular estate, and the person who hath the reversion; as tenant by statute merchant, and the person on whose seisin the extent was sued.

It is also to be remembered, that the *estate*, as well as the privity, must continue down to the time at which the release is

(*h*) 1 Inst. 272, b.

made; for *mere privity* without an estate, or an estate without privity, is no foundation for a release (*i*), as will be shown under the divisions of this head.

In Sheppard's Touchstone (*k*), there is this passage:—"So also, if *donee* in tail "make a lease for his *own* life, and after "donor release to *donee* and his heirs, it "seems this is not a good release." It is difficult to comprehend the objection against this release. The law is now well understood to be, that the *donee* retains a reversion, and the privity between him and the former reversioner continues, and he is still tenant in tail, notwithstanding the grant for his own life (*l*).

The case of a *donee* is probably inserted for that of a *lessee*. Lord Coke puts the case of a release to the lessee. The release as made to the lessee, was open to the objection, that the privity was between the donor and *donee*, and not the donor and the lessee of the *donee*.

The same principles, *mutatis mutandis*, apply to particular tenants, whose estates are to be enlarged by *remainder-men*, and also to *remainder-men* by whom grants

(*i*) Litt. 461. 1 Inst. 273, a. 296.

(*l*) *Machel v. Clarke*, 2 Lord Raym.

(*k*) Shep. Touch. p. 323.

may be made, in enlargement of particular estates.

It is immaterial whether the remainder or reversion be for life, in tail, or in fee, except that alienation by tenant in tail will not be binding, as far as it depends on the release, to the prejudice of his issue. Hence, as will be collected from former observations, a tenant in fee or in tail (*m*), as well as a tenant for life, is competent to convey by lease and release. A seisin in law will also suffice for the ability to make, or capacity to receive, the release.

And whether a person hath the estate in his own right, or in right of his wife (*n*), that estate is equally capable of enlargement.

And it is immaterial whether the estate which the husband has in right of his wife, be an estate for years, which he may absolutely alien, or for life, and consequently of freehold, which he alone cannot alien as against his wife.

The estate which one has in the right of a testator or intestate, or as a trustee, is also capable of enlargement. Thus a man who hath a term for years as executor, is capable

(*m*) *Machel v. Clarke*, 2 Lord Raym.

(*n*) 1 Inst. 173, 299. Shep. Touch. 321.

of a release in enlargement of his estate, and a release to a husband seised or entitled in right of his wife may operate, whether made to him solely, or to him and his wife jointly; and when the grant by way of release is to him and his wife, the inheritance may pass to one or to both, agreeable to the intention of the parties (*o*).

And though a tenant for twenty years in possession, make a lease to *B.* for ten years, and *B.* enters, and he in the reversion release to the original lessee for years, this will be a good release to enlarge his estate. Between the releasor and releasee, there is a continuance of privity; but as will be observed under the proper division, there is not any privity between the under-lessee, (the tenant for ten years), and the reversioner in fee (*p*), while the estate for twenty years continues. A release from the owner of the fee, to the under-lessee, during the term of twenty years, cannot operate to the enlargement of his estate, though it may operate as a grant to him, in the same manner as it might operate as a grant to any stranger.

So if tenant in tail create a particular estate for life, the person who hath the re-

(*o*) Shep. Touch.

(*p*) 1 Inst. 273, a.

mainder or reversion in fee, cannot enlarge this estate for life, by release, because there is not any privity between the estates of the releasor and releasee (*q*).

The privity is two-fold: First, between the tenant for life, or in tail, and his tenant; secondly, between the tenant for life or in tail himself, and the person who hath the remainder or reversion in fee.

That a release may operate in enlargement of estate, it must be either from the tenant in tail to his own lessee, or from the person who hath the remainder or reversion in fee to the tenant in tail. For it is the particular property of this species of assurance, that it should proceed from one who has an estate in reversion or remainder, in favor of a person who has a *prior* particular estate. This is implied in the nature of the assurance, and from its mode of operation, to enlarge the estate *of a tenant*; while a grant proceeding *from a tenant* to the person who has the next vested estate, in remainder or reversion, does, instead of enlarging the interest of the grantee, cause the *merger, surrender, or extinguishment* of the particular estate.

A surrender or release of right to the remainder-man or reversioner, may enlarge or accelerate his right to the possession, by

(*q*) 1 Inst. 273.

rendering it more beneficial, though it cannot give any extension, in point of legal duration, to the estate of the grantee.

Let a tenant for life accept a surrender of a term of years, the tenant for life has still a mere life-estate. So if *A.* be tenant for life, with remainder to *B.* for his own life; a surrender from *A.* to *B.* would leave *B.* in the condition of being tenant for his own life. His estate would of consequence determine on his death in the life-time of *A.*: while if *A.* had accepted a release from *B.*, the estate of *A.* for his life, as it is larger than the estate he receives from *B.*, would enable *A.* to hold for the lives of *A.* and *B.*, because no merger would take place, since a subsequent estate cannot merge in a prior estate. This is a singular and peculiar instance. So if *A.* and *B.* had joined in a grant to *C.* for their lives, there would be an union or consolidation of estates, without merger, and *C.* would be entitled to hold for the several lives; while under distinct grants from *A.* and *B.*, the estate for the life of *A.* would merge in the estate for the life of *B.*

The more obvious case for exemplifying the doctrine, is, that if *A.*, tenant for a thousand years, leases for nine hundred and ninety-nine years, he still retains an estate for a thousand years; he has a reversion. The under-lease merely excludes him from

the possession. He is capable of a surrender, and after surrender of the nine hundred and ninety-nine years, he will have precisely the same estate as formerly—neither more nor less than the residue of the term of a thousand years (a).

Again, if *A.* be tenant for twenty years, with reversion to *B.* for ten years; or *A.* be tenant for ten years, with reversion to *B.* for twenty years, in either case, the estate of *B.* will not be enlarged or extended by the purchase of the prior estate; but by the merger of the prior term, he will have the right of enjoyment for the period of that estate which belonged to him before he purchased the first term.

These cases apply only when *B.* has a reversion; for when his interest is an *interesse termini*, to commence on the merger, surrender, or determination of the prior term; then there are in effect two distinct periods for enjoyment, one independent of the other. The times of enjoyment are not concurrent. They do not fill the same space of time; and for that reason, *B.* by acquiring the estate of *A.*, does in effect and in law, acquire a distinct interest, which will confer on him the right of enjoyment for the period which is to elapse in the interval, before the commencement of the in-

(a) *Challoner v. Davis*, 1 Lord Raym. 403.

terest which was in *B.*, before he acquired the estate of *A.*

Lord Coke (*r*), indeed, observes, "If a man make a lease for ten years, the remainder for twenty years, he in remainder releaseth all his right to the lessee, he shall have an estate for thirty years."

The alleged reason is, "one chattel cannot drown another, and years cannot be consumed in years (*s*)."
The reason as applied to merger is not correct. If the point be law, it turns on the circumstance that the remainder is by the grant of its owner added to the prior estate; thus making a distinction, on the one hand, between a release by the remainder-man to the prior tenant, and on the other hand, a surrender from the prior tenant to the owner of the remainder.

It is also to be noted, that the mere circumstance that the grantor has a prior estate, is not any impediment to the right of his making a release, in respect of another estate held in reversion or remainder, expectant on the estate of the grantee. Let it also be remembered, that the doctrine of releases in enlargement of estates, depending as it does entirely on privity, necessarily requires that the release should

(*r*) 1 Inst. 273, b.

(*s*) *Challoner v. Davis*, 1 Lord Raym. 402.

proceed *from* the person who hath the remainder or reversion, *to*, or in favour of the person who hath a *particular* estate; for every assurance proceeding *from* the owner of a particular estate, must be either an *under-lease* or a *surrender*, or when there is an intermediate estate, an *assignment*.

But when the conveyance is made by lease and release, the parties change their relative characters; the lease, though made by a particular tenant, creates a privity between him and the lessee, and such lessee becomes capable of a release in enlargement of his particular estate, created by the lease, without any objection arising from his having the remainder or reversion under a more remote estate.

Cases of immediate Privity.

The cases of immediate privity are between a lessor and his lessee; a tenant for years or for life, and the person who has the immediate reversion, or remainder in fee, for life, or in tail; between a copyholder and the lord; between a *cestui que trust* and his trustee; a tenant by statute or elegit, and the person who has the reversion or estate of the debtor. And in all cases the *assignee* of the particular tenant may be considered as standing in his place; and the as-

signee of the reversioner or remainder-man may be considered as standing in his place. The examples which have been adduced under former divisions, sufficiently illustrate this part of the subject.

There is abundant authority, as will appear in former parts of this chapter, to prove, that an estate is capable of an enlargement, although that estate does not confer a right to the *immediate possession*. It is evident that the word *possession*, as it occurs in different writers, is to be referred to an *actual* or *vested estate*, whether in possession, reversion, or remainder; not to an estate necessarily attended with actual possession, or the right to the *immediate enjoyment* of the possession.

Cases of Priority notwithstanding a Mesne Estate.

When there are three estates, as to *A.* for life or for years, remainder to *B.* for life or in tail, reversion to *C.*, in this case, *B.* may, by release, enlarge the estate of *A.* and *C.* may enlarge the estate of *B.* To this extent the law is clear, for the estates of the releasor and releasee are immediate; for the remainder-man is immediate

tenant to the reversioner. The same connection would exist between the tenant in fee, and the remainder-man for life, even though the fee had been granted by way of remainder, instead of being retained as a reversion; and for that reason a release from the owner of the remainder in fee to the owner of the estate for life, would be good.

It is agreed, that as between a *particular tenant* and a *reversioner*, it is not necessary that the estate to be enlarged, and the estate of the person who releases, should be *immediately* expectant: therefore, if a man make a lease for years, the remainder for life, a release by the lessor to the *lessee for years*, will, notwithstanding the interposed estate *for life*, be good; for the lessee for years hath both *privity* and estate (s).

Whether (t) a person who has a remainder in fee, can under these circumstances, enlarge the first particular estate, while the *mesne* estate continues, is a point as to which the books are involved in much confusion.

According to Sheppard's Touchstone (u),
 " If there be tenant for life, remainder in
 " tail, remainder in fee, and he in remain-

(s) 1 Inst. 273, a. Litt. s. 465.
 Gilb. Ten. 70. Shep. Touch.
 322, 323.

(t) 1 Inst. 273. a.
 (u) Shep. Touch. 321.

“ der release to tenant for life, this will
“ not increase his estate.”

The only objection against the release, must be the interposed estate-tail; and perhaps, Sheppard merely intended to express that which is correct in point of law; namely, that the estate of the tenant for life would not, by force of the release, be enlarged, so as to merge or extinguish the estate for life, and exclude the mesne estate.

Considered in any other sense, Sheppard is not consistent with himself: for in another page, (v) he admits that if *A.* be tenant for life, remainder to *B.* in tail, remainder to *C.* for life; remainder to *A.* in fee, and *A.* die, and his heir release to *B.* being in possession, this is a good release, and gives the fee-simple: and the case of *Francis v. Pack* (w), was attended with these circumstances, and received a decision in favour of the release. In this, as well as in the former instance, the release proceeded from a person who had a remainder in fee, and there was an intermediate estate, and the interposed estate of freehold did not prevail as an impediment to the validity of the release; and in another passage

(v) 323.

(w) 1 Roll. Abr. 400.

in 2 Rolle's Abridgment (*x*), it is said to be admitted by Finchden (*y*), that if there be a lease for life, remainder for life, remainder in fee; he who has the remainder in fee may enlarge the estate of the lessee; and yet it must be remembered, he had the first estate for life. The position in Sheppard, therefore, seems to have been inserted, either without sufficient authority, or under the impression which is stated.

On principle, and also on authority, it seems that a grant from a remainder-man, as well as a reversioner, may operate by way of release in favour of a particular tenant, notwithstanding a mesne or interposed estate (*z*). So when there is tenant for life, remainder in tail, remainder in fee, and he in remainder in fee releases to the tenant in tail, this will clearly increase, or make an accession to his estate, being a case of immediate privity: and it is admitted by all the books, and even by Sheppard in his Touchstone (*a*), that if the fee be held by way of reversion, instead of remainder, the owner of the fee may enlarge the estate of the first tenant, notwithstanding the mesne estate.

(*x*) p. 400. pl. 3.

Touch. 321.

(*y*) 44 Assize, 35.

(*a*) Shep. Touch. 326. 1 Inst.

(*z*) Co. Litt. 273, a. Shep. 273, a.

Sometimes, however, the effect of a release to a tenant for life, by a remainderman or reversioner, will be to *exclude* a mesne remainder.

This happens, when the mesne *interest* is a *contingent* remainder of freehold. In this instance, by the enlargement of the particular estate by the grant to the tenant of the reversion or remainder, the contingent remainder will be deprived of the support of the particular estate, on which it depended for effect, and will, for that reason, be destroyed.

But if there had been any other particular estate by which the contingent remainder was supported, and which either preceded the estate of the releasee, or which was interposed, and prevented the merger: in either case the remainder would be preserved, at least during such particular estate. But the particular estate and the contingent remainder must bear to each other the characters and relation of a particular estate and remainder. Thus if *A.* be tenant for life, with reversion in fee to *B.*, and *B.* grants to *C.* for life, with remainder in contingency to *D.* for life or in tail, with remainder to *E.* in fee, or retains the reversion; the enlargement of the estate of *C.* while the remainder of *D.* is in contingency, would destroy the contingent remainder,

notwithstanding the continuance of *A.*'s estate.

On the other hand, if *A.* be tenant for life, remainder to *B.* for life, remainder to *C.* either for life, or in tail, in contingency, with remainder or reversion in fee to *D.*, the enlargement of the estate of *A.* or of *B.* by release, would not destroy the contingent remainder, while it retained the support of the estate of *A.* or of *B.* as a distinct and subsisting estate.

But let it not be forgotten, that by the union, or merger, or surrender of one particular estate, the union, the surrender, or merger, of another estate, and the consequent destruction of a contingent remainder may be effected.

These instances of the destruction of contingent remainders, must be confined to legal interests. Contingent remainders of trust or equitable interests, do not admit of destruction by the merger or enlargement of the particular estate.

It remains to be noticed, that in *Francis v. Pack* (*h*), already cited, as the case of *A.* tenant for life, with remainder to *B.* in tail, with remainder to *A.* in fee; it was held that by release, *A.* might transfer his remainder *in fee* to *B.* who was the remain-

(b) 2 Roll. Abr. 400. pl. 7.

der-man in tail, but that he could not transfer his estate for life to *B.* This conclusion is right, as applicable to the technical doctrine of releases. At this day it is highly probable and almost certain, that the release would be construed as a surrender of the estate for life, as well as a grant by way of release of the remainder in fee. In one case *A.* was tenant for life, with remainder to *B.* in fee, and *A.* leased to *C.* for years : it is obvious, *B.* could not have released to *C.* for want of privity while he remained the tenant of *A.* And yet a release from *A.* and *B.* jointly to *C.* was held to operate to enlarge the estate of *C.* into a fee. The only ground on which this release could be supported *as such*, is, that it had effect first as a release from *A.* to *C.* and afterwards as a release from *B.* to *C.* ; so that it first passed in construction of law, the estate for life, and then enlarged the estate for life into a fee-simple.

Cases of Privity, because a derivative Estate is discharged from its original Privity.

It has frequently been stated, and will be more fully shown, that a derivative estate cannot be enlarged by a release to the under-

lessee, while the estate of the lessor, who granted the estate of the under-tenant, shall be continuing. When that estate shall be determined, as it may be by merger, surrender, &c. without defeating the estate of the under-tenant; (for the rule of *cessante statu primitivo cessat derivativus*, admits of these exceptions :) then it should seem from principle, that there will arise a connection between the *under-tenant*, and the person who has the next vested estate, so that the relation of lord and tenant will exist between them for the purposes of waste, surrender, and merger, and of consequence, to enable the person who was an under-tenant, and who is now discharged from that relation, to become a releasee in enlargement of his estate. This point will be more fully discussed under a subsequent division.

Of Want of Privity.

1. *Because there is mere Privity of Tenure for the sake of Remedy, and not of Estate.*

It is not sufficient that there should be merely privity of person or connection by way of remedy, with the reversioner or remainder-man. There must be privity of continuing estate between the releasor and releasee. This is evident, from the case of

tenant by the *curtesy*, who has *aliened* his estate. Though he remains, for some purposes, tenant to the reversioner, as for instance, to be liable to an action of *waste*, yet as the *privity of estate* has ceased, he is no longer capable of this release.

The like observation is applicable to a tenant for years, who has been ousted from his term, or of a tenant for life, who has been disseised of his estate for life, by a person who enters claiming that estate, without disseising the owner of the reversion or remainder. Such termor, for years, or life, having a right of entry only, is *very tenant*, and capable of a release of *rent* or *services* (c).

But for the want of *privity in tenure*, and also of estate, this species of release cannot be made to a *quondam* tenant for life, or tenant in tail, after the reversion or remainder has been divested or discontinued by a tortious alienation, and while the reversion or remainder continues a mere right of entry or of action.

Also, after a disseisin of a tenant for life, merely claiming his estate, the reversioner or remainder-man cannot release by way of enlargement to the *disseisee*. He may release the services to him in extinguishment of these services; or he may grant to

(c) Litt. 454, 455, 456, 457, 458, 465.

him, as to any other stranger, the remainder or reversion, admitting it to be, as it is understood to be, a subsisting estate.

Also, after an assignment by a tenant for years, or for life, the original tenant for life may, by virtue of some express covenant, or until acceptance of the assignee as tenant, remain liable to rents, covenants, &c. &c. and yet he will be incapable of a release by enlargement. This impediment arises from the want of estate.

The releasor must also have an estate in remainder or reversion, expectant on the estate of the releasee. Acts proceeding from a particular tenant (*d*), for the benefit of a person, who has an estate in remainder or reversion, enure in a different mode from this species of assurance. They may, according to circumstances, be grants, assignments, or surrenders, but they cannot have efficacy as releases.

2. Of the Want of Privity, because the Estate is assigned.

Respecting the capacity of assignees, it will be proper to observe, that after a particular tenant has assigned all his estate, he no longer has an interest which admits of

(*d*) Shep. Touch. 324.

enlargement. The release must be to the assignee, or it will be ineffectual. The same doctrine also applies to the reversioner: for if the reversioner part with all his estate, his assignee is alone competent to make an available release. This privity of estate must continue, till the release is made: therefore, if tenant for life, or in tail, *assign* all his estate, he is no longer capable of a release. To be effectual, the release must be made to the assignee (c). But when the tenant for life, or in tail, creates a particular estate, and retains a reversion, then the privity still continues between him and the person in remainder or reversion; and for that reason, the tenant for life, or in tail, may still be a releasee.

And wherever a release would be good, as from the donor, if he remained the owner, it will be good if made by his heirs or assigns, while they continue owners; and as to his assigns, whether they have the whole or only part of the estate.

So, whenever a release would have been good to a lessee or donee, before assignment, it will, after assignment, be good to his assignee. But it is observable that no one can be the assignee of the lessee or donee, unless he hath all the estate; for if any *reversion* remain in the lessee or donee,

(c) 1 Inst. 273.

there is not any assignee, and consequently the privity remains between the lessor and lessee, *donor* and donee, &c.

That an alienation (*f*) may deprive a tenant of his capacity to receive a release, he must have parted with all *his estate*. As often as he creates a derivative interest, and retains a reversion, he has, in point of law, his former estate, subject only to the estate of the under-lessee, and this derivative interest is not any impediment to his acceptance of a release.

The tenancy between him and the reversioner or remainder-man, still continues, and at the same time a new tenancy is created between the owner of the particular estate, and those who derive an interest out of his estate; and the last lessor (being the particular tenant) may release to his own tenant, by way of enlargement, or may accept a release by way of enlargement from the person who has a reversion or remainder expectant on his own estate.

(*f*) Dy. 4. Arg. Shep. Touch. 326.

3. *Of want of Privity, because there is not any Estate, but merely a Right or Interest.*

It is also necessary, as may be inferred from former observations, that the releasor should have a vested estate. A mere right or title of entry, or a contingent remainder, or an interest by executory devise, or an *interesse termini*, does not confer the right of granting an estate. Such an interest, when the person is ascertained, may be released by way of extinguishment of the right or interest: but a release by the owner of such interest, cannot have effect in the mode, in which the release in enlargement of estate must operate; that is, by *transferring* an actual estate.

It follows, that this assurance is not proper for persons having mere rights of entry or of action. That a release in enlargement of estate may be good, it must proceed from a person who has a *seisin*, to, or in favour of his *own tenant*, or of a person connected with him in privity of estate, consequently of a person who has a *vested* interest.

Therefore, if *A.* be tenant for life, remainder to *B.* for life, remainder to *C.* in fee, and *A.* be disseised, this in ordinary

cases, is a disseisin of those in remainder; and while the disseisin continues, no release of estate, to operate by way of enlargement, can be made with effect by *B.* to *A.*, or by *C.* to either of them.

The utmost effect which a release between these parties can have, is to extinguish a reserved rent, or service, as already noticed.

So, if the disseisor make a lease for life, a release from the disseisee to the lessee for life, will not operate by enlargement; for no estate remains in the disseisee. The proper assurance between these parties is a confirmation (*g*) of title; and the release, it is assumed, may operate as such confirmation.

The observations which show the difference between the union in one and the same person, of two terms of years, as distinguished from the union of a term, and an *interesse termini*, should be considered as relevant to this head.

And though it be true, that no interest, unless it confer a vested estate, can be enlarged by release; and that an *interesse termini*, or a contingent remainder, or an interest by way of executory devise, or springing or future use, cannot be enlarged by release, while the interest continues in

(*g*) Litt. s.

an executory state ; yet the moment the interest becomes vested, and confers an estate, the estate conferred by this interest will be capable of enlargement by release.

4. Of the Want of Privity, because the Estate is derived out of a mesne subsisting Estate.

From former observations it may be collected, that the creation of a derivative interest, by the particular tenant, will not disqualify that tenant to receive a release ; and that the creation of a particular estate by a reversioner or a remainder-man, will not incapacitate him, to enlarge the estate of the tenant in the original lease, or under the original particular estate. On the other hand, the reversioner or remainder-man, cannot, by release, enlarge a particular estate created out of another particular estate, as in the instance of a lessee who makes an under-lease (*h*). The estate of the under-lessee cannot be enlarged, at least while the particular estate shall be subsisting and interposed ; for the privity during that period will be between the lessee in the under-lease, and his lessor : and not between the under-lessee and the person who hath the

(*h*) 1 Inst.

reversion or remainder, expectant on that interest, which *originally* was the particular estate.

Hence the observation of Lord Coke, that if *A.* make a lease to *B.* for life, and *B.* maketh a lease for years, and after, *A.* releaseth to the lessee for years, and his heirs, this release is void to enlarge the estate; because there is no privity between *A.* and the lessee for years.

And again, if a man make a lease for twenty years, and the lessee make a lease for ten years, if the first lessor doth release to the second lessee, viz. the lessee for ten years, and his heirs, this release is void, for the cause aforesaid. For the same cause, if the donee in tail make a lease for his own life, and the donor release to the lessee and his heirs, this release is void to enlarge the estate.

In Sheppard's Touchstone, 233, the same point is applied to a release to the donee after he hath made a lease for his own life; but with reference to the law as now settled, the latter point must be considered as untenable. It was in all probability grounded on the doctrine of Littleton (*i*), now exploded, that a grant by a tenant in tail

(2) Litt. s. 613. *Tooke v. Machell v. Clarke*, 2 Lord Ray-
Glasscock, 1 Saunders's Rep. 250. mond, 778.
Seymour's case, 10 Rep. 96.

of all his estate, was a grant only for his life.

A change of circumstances by merger, surrender, or forfeiture, in that estate which originally was the particular estate, may, it is apprehended, place the under-lessee in a situation to receive a release from the owner of the original reversion or remainder; but although there be no privity between an under-lessee, and the owner of the reversion or remainder expectant on the estate of the lessor of such under-lessee; yet if the reversioner or remainder-man makes a lease for life, or gift in tail, the lessee under such lease, or the donee under such gift, becomes the owner of the immediate reversion, and will be in a situation to enlarge the estate of the tenant of the original particular estate. Thus there will be an increase of interest in that relative connection of the tenants, which creates the necessary privities, and the following consequences will result: If *A.* lease to *B.* for life, and he under-leases to *C.*,—*B.* may release to *C.*, his own tenant, or *A.* may release to *B.*, since *B.* is his tenant; but a release from *A.* to *C.*, while tenant to *B.*, will not be available. Again, suppose *A.* to lease to *B.*, and afterwards to lease to *C.* for life, or to make a gift to him in tail, *A.* may release to *B.* or to *C.*, for each of

them is his tenant; and C. as well as A. may release to B., for B. is immediate tenant to A. while C. is tenant to him under a remote interest. The most obvious case for enlargement, is a release from a lessor to his own lessee: and a bargain and sale, or lease for a year is adapted to these circumstances; for the lease for a year creates a particular estate, leaving an immediate reversion in the lessor; and by the release, that reversion is granted to the lessee, in enlargement of his estate, taken under the lease, or bargain and sale; and, as has already been shewn, the object of the lease for a year, with a view to its practical utility, is generally to create an estate which may be enlarged by release; and in many cases, as when the purchaser is already the owner of a particular estate, under an old term of years, to have certain and more modern evidence, by the creation of a new term, that there is an estate which may be a proper foundation for the release.

But when the owner of a particular estate creates an under-lease, either for years or for life, the privity of estate is between him and his tenant. The estate of his tenant may be enlarged by a release from him, but it cannot be enlarged by a release from the owner of the original reversion or remainder, while he has an estate expectant on the interest of that person by whom

this under-lease was made; but as has already been observed, if *A.* be tenant for life, with remainder to *B.* in fee, and *A.* create an estate for years, or derivative estate for life to *C.*, by way of under-lease, *A.* is still capable of a release from *B.* for the privity of estate still continues between them.

This privity also may be changed from *A.* to *C.*, so that *C.* may be capable of a release; and therefore, if the estate of *C.* be enlarged by release from *A.*, the estate of *C.* may afterwards be enlarged by a release from *B.*, for *C.* becomes the tenant of *B.*, in consequence of receiving the estate of *A.* It was in this mode that a release was supported from *A.* and *B.* in favor of *C.*, when *A.* was tenant for life, remainder to *B.* in fee, and *A.* granted to *C.* for years, and afterwards *A.* and *B.* joined in a release to *C.* (*k*); for this release operated first as the release of the tenant for life, to his own tenant; and secondly, as a release from the remainder-man or reversioner, to the under-lessee, thus become immediate tenant to the reversioner or remainder-man by the purchase of the estate of *A.* and the consequent merger, or rather consolidation of his own estate for years. By this operation, the privity between *A.* and *C.* ceased,

(*k*) Shep. Touch. 323.

and in an instant a new privity was created between *C.* and *B.*, now bearing to each other the relation of lord and tenant, or tenant and reversioner or remainder-man. Let it be called to mind, that though the estate of *A.* may be merged or forfeited, so as to be extinguished in the estate of *B.*, such merger, surrender, or extinguishment, will not give any right to *B.* to receive the *rent* from *C.*, or take advantage of the covenants or conditions annexed to the estate of *C.* (*l*)

This has been said to be for want of privity; a better reason perhaps is, it is for want of a right to the identical reversion; for this right and the other benefits were annexed to a reversion which is extinguished. May not *C.* (*m*) surrender to *B.*? It should seem he may; and if he may surrender, there is not any well founded reason against his capacity of receiving a release from *B.*, in enlargement of his estate. In short, the case in *Sheppard's Touchstone*, does in effect decide that there is a privity sufficient to support a release. And at the common law, the grant of *B.* after the merger, surrender, or extinguishment of the estate of *A.*, would not, it is apprehended, have been good, without the attornment of *C.*

(*l*) *Webb v. Russell*, 3 Term Rep. 393, 681. (*m*) After *A.*'s estate is merged.

While the estate of *A.* continued, and attornment was necessary, he was the proper person to attorn to the grant of *B.*; but when *A.* no longer retained the estate, the principles of tenure required that there should be the attornment of *C.* If this were so, there would be privity of estate between *B.* and *C.*; at least for some purposes, although there was the want of privity of contract. Therefore, though no authority for the point may be found, there seems good reason to suppose, that a release from *B.* to *C.* would be good after the impediment arising from the estate of *A.* was removed: and indeed the case in Sheppard's Touchstone seems a sufficient authority for this purpose.

The observations respecting rents, covenants, &c. must be understood of the common law. By a statute, 4 Geo. 2. c. 28. remedy is given in certain cases for rents against under-lessees, notwithstanding a surrender, and the acceptance of a new estate, for the purpose of *renewing their leases.*

4. Of the Want of Privity, because the Estate is determined.

4thly, For the sake of illustration of the general principles which govern this doc-

trine, and to preserve the order of arrangement, it may be observed, that the possession which a person formerly tenant for years has by *sufferance*, and who is, without much attention to technical accuracy, denominated a *tenant* by sufferance, cannot be enlarged by a release. The reason is obvious : he has a mere naked possession ; and no estate ; no privity. So after the determination of the interest of any other particular tenant, such quondam tenant has not any estate capable of enlargement.

Concluding Observations.

Whenever any difficulty arises in giving effect to an instrument, as a release, for want of privity of estate, or for want of any prior estate, it will be proper to consider whether the instrument intended as a release may not operate in some other mode, viz. as a surrender, appointment, grant, or covenant to stand seised, a confirmation, or a release of right. Whenever circumstances will admit of its operating in either of these modes, the decisions of modern times, indeed the general rules of construction, and the principles of law, justify the expectation that the operation of the instrument may be supported, in either of those modes, whichever will give effect to the general

or immediate object of the parties to change the title from the intended releasor to the intended releasee.

The complex doctrine involved in the learning on releases, strongly enforces the prudence of adhering to the practice of making a lease for a year, as the foundation for a release, instead of relying, as is sometimes done, from motives of æconomy on a release to the assignee of a mortgage term, or some ancient estate, long since created; so that the release could operate in that mode only, under the common law learning, applicable to releases, without the aid of those more simple rules, to which a lease and release, as parts of the same assurance, owe their origin and introduction into practice.

In practice, it should never be forgotten, that one of the great advantages of a lease for a year, as part of the same assurance with a release, is, that the lease for a year enables the releasee to give from his own title deeds, certain evidence that he had, at the date of the release, an estate capable of enlargement by release.

Of the Form of the Lease for a Year.

In order to a review of the form of the lease, it will be in course to consider,

1st, The date.

2dly, Who are the proper parties.

3dly, The consideration on which the lease must be grounded.

4thly, Who may be the grantor.

5thly, The formal words of grant.

6thly, Who may be the grantee.

7thly, Of what parcels there may be a bargain and sale, and the cautions to which attention must be paid in describing the parcels.

8thly, The habendum.

9thly, The reservation of rent.

10thly, The declaratory clause; shewing the intention with which this assurance is made.

1. Of the Date.

The lease for a year is generally dated on the day next before the day of the date of the release. It is ordinarily also executed by each person, grantor in the lease, before the execution by that person of the indenture of release ground-

ed on the lease. This is the correct practice, and should be observed, as closely as circumstances will admit.

The material point is, that the lease for a year should give a *vested* estate, capable of enlargement, and be subsisting at least in legal intendment as a vested estate, prior to the execution of the deed of release. This is evident from all the preliminary observations, in which the nature and objects of this assurance have been considered.

Of course, no objection can arise from the circumstance that the lease for a year is dated at a more distant period than one day prior to the date of the release.

Sometimes, indeed, even in modern practice, there is an interval, in point of date, of a day between the day of the date of the lease, and the day of the date of the release, instead of having the lease and release dated on *successive* days. This happens from the caution of not dating *the* deed of lease or release on a Sunday. But a deed dated or even *executed* on a Sunday, is binding, and free from all well founded objection. The statute for the better observance of the Lord's day (*l*), applies to process and proceedings of the

(*l*) 29 Charles 2d, c. 7.

courts, and dealings in the course of *trade*, and not to the private transactions of individuals, as between themselves by way of conveyance; without the interposition of the courts (*m*), as is the case with fines and recoveries; transactions which are invalidated by the rules of the common law, when they appear to have taken place on a Sunday, which is considered as a *dies non juridicus* (*n*).

Sometimes also the lease and release are, from inadvertence, dated on the same day; and it has been decided, that the assurance is good, by giving priority to the lease for a year (*o*).

Supposing it should appear in evidence that the lease and release were both executed on the same day, but the release was *executed* before the lease for a year: it is highly probable, that even under these circumstances, the court would support a title derived under these instruments. The lease and release are parts of the same assurance; and the court might well decide, that the execution of the several instruments was to be considered as one entire

(*m*) *Drury v. Defontaine*, 1 Taunt. 131.

(*n*) Wingate Maxims, No.

(*o*) Freeman, 251. *Taylor v. Horde*, 1 Barr. 106, 107.

transaction, and that the law gave priority, in its construction, to the execution of the lease for a year (*p*).

Many authorities may be found which afford a principle for such arrangement. Thus a lease, release, fine, and recovery, or a fine and declaration of uses, operating by way of *appointment*, are parts of the same assurance (*q*). In considering their effect, no regard is had to *the priority of date of one instrument before the other*. So a lease and release, considered separately, would operate simply as a rightful conveyance, yet taken in connection with a subsequent fine, forming part of the same assurance, and levied in pursuance of a covenant or agreement in the release, will operate by *discontinuance* (*r*).

In some cases there may be a mistake in dating the lease and release, by giving priority of date to the release, instead of the lease. Under these circumstances, the recital, in the release of the lease, would in all probability be a foundation for averring the prior delivery of the lease for a year ;

(*p*) *Cromwell's Case*, 2 Rep. 74, b. 75.

(*q*) *Ferrers v. Fermer*, Cro. Jac. 643. *Selwyn v. Selwyn*, 2 Bur. 1131. *Herring v. Brown*, 2 Show. 185.

(*r*) *Doe on the demise of Odiarne v. Whitehead*, 2 Burr. 703, as contrasted with *Seymour's Case*, 10 Rep. 96.

thus making it a good and sufficient groundwork for the release, or the recital would be evidence of a separate, distinct, and antecedent release(s): and the rule of law admits, that a party may plead a deed, as dated on one day, and first delivered on another day (t).

For the date of a deed is not conclusive: on the contrary, the time of actual execution may be shewn either by the person who adduces the deed, or the person who resists or questions its operation. Thus, in *Lord Say and Sele's case* (u), the time of the execution of a deed, declaring the uses of a fine, was shewn, with a view to impeach the validity of a recovery. The recovery, however, was supported by a fine, levied after the recovery was suffered, so as to have relation to a time antecedent to the recovery. Also the time of the execution of a lease may be shewn (w) to prove that the lease was delivered after the day of the date, so as to be a lease of a present interest, and not a reversionary lease. Also the

(s) Wightwick's Exch. Rep. expressed in the deed was referred to for the purpose of construction, though it was delivered on a subsequent day.
 (t) *House v. Laxton*, Cro. Eliz. 890. *Stone v. Bayle*, 3 Lev. 348. Comyns's Digest, Facts, B. 3. *Doe v. Day*, 10 East, 427, in which the date
 (u) 10 Mod. 40.
 (w) East's Rep. 427.

time of the execution of a deed may be shewn, to make out the fact, that the freehold was not granted *in futuro*, as the deed imports; but that the first delivery of the deed was after the time expressed for the commencement of the estate, so that the freehold passed immediately from the delivery of the deed.

Indeed, in *Barker v. Keate* (v), North said, "that when things are done in the same instant, they would transpose them and suppose a precedency; it being to support common assurances: and he also said, he had known it ruled several times, that a lease and release in the same deed, was a good conveyance, for priority should be supposed."

Language to the same effect will be found in *Cromwell's case* (w).

Of the Parties to the Lease for a Year.

2dly, All persons who are to convey any estate, and could not convey that estate at the common law without livery of seisin, must *necessarily* be lessors or grantors in the lease. This instance may be

(v) Freeman, 250.

(w) 2 Rep. 74, 75.

understood, as that alone in which there is any absolute occasion for a lease for a year from conveying parties, since under any other circumstance, the intended conveyance may operate as a grant.

It is equally necessary that the person or persons to whom the release is to be made, should be the lessees in that part of the assurance now under consideration.

The very foundation of the release is the lease; and, as it has been already observed, the lease is used merely to supersede the necessity of livery of seisin, in short, to create an estate, capable of enlargement, instead of passing the freehold immediately by livery of seisin.

In strictness, therefore, the omission in the lease of those persons, who might transfer their estate by grant, without livery of seisin, is not so material as to raise an objection to a title; for the release may operate as a grant, though it cannot be effectual as a release, and it may as to some persons operate as a release, and as to others as a grant. And it should seem that in all conveyances by persons who are merely *cestuis que trust*, the lease for a year is not essentially necessary as part of their assurance, since at the common law, they could not have conveyed by livery of seisin. Any instrument which expresses an

intention to transfer the beneficial ownership from one person to another, is effective in a court of equity (x). But from caution, it is the uniform practice of conveyancers to make the *cestuis que trust*, and all persons who are to join in the release as conveying parties, lessors in the lease. And by a gentleman, whose experience entitles his opinion to the utmost respect, a doubt has been expressed whether a conveyance can be made, by a *cestui que trust*, without a lease and release, if, under similar circumstances, a lease and release would be requisite to convey the legal estate. This doubt is evidently founded on a rule to be found in the Reports, that equitable estates 'are to be conveyed in the same manner, &c. as legal estates. The rule, however, can never be reasonably carried to the extent of requiring a feoffment, a lease and release, or inrolment as part of a bargain and sale. Courts of equity look to the substance, rather than the form: and the intention to convey, clearly manifested by the language of the deed, is the substance, while the *mode* of conveyance is merely *form*. Courts of law relax as much as possible from the strict rules which require

(x) Francis's Maxims, 53. the act." *Brydges v. Brydges*,
 "Equity regards not the cir- 3 Ves. jun. 120.
 cumstance, but the substance of

particular forms to be observed. On an equitable interest, the deed operates as a conveyance of a different nature. It is merely on account of principles of tenure, and to comply with the established rules of law, depending on reasons which no longer exist, that livery is essential to a feoffment, that a bargain and sale shall be enrolled : and that the freehold in possession of lands shall not pass merely by a grant, without first creating a particular estate to be enlarged by the grant. Trust estates are not within the influence of these rules, nor do they in any view, governed by principle, require the application of these rules (*a*). It seems to carry the analogy too far, to require that the identical mode of assurance, proper for passing a legal estate in lands, should be observed in passing the equitable interest in the lands. Besides, when the court is in the habit every day of deciding that an irregular and informal instrument, (even a mere contract for sale,) will change the equity from one person to another, so as to convert the owner of the legal estate into a trustee for a person who has by these means become beneficially interested ; is it too much to conclude that the court would deny to a formal instrument of grant, the operation of changing the equitable interest of one person

(*a*) *Wright v. Wright*, 1 Ves. 409.

from him into another person, according to the intention expressed in the instrument? And whoever traces the decisions of courts of equity, it is apprehended, will find sufficient reason to be satisfied that the equitable estate may be changed from one person to another by *mere grant*, without those ceremonies of livery, enrolment, a lease to precede a release, which are founded on principles of tenure.

It is a rule of courts of equity, that the fee may, when the intention requires it, pass, without a limitation to the heirs; and if these courts dispense with words of express limitation, so essential to the extended operation of a conveyance at the common law, what reason is there for a strict adherence to those rules of law which require a particular mode of assurance, on grounds peculiar to legal estates, and to the laws of tenure, by which the mode of conveying these estates is regulated? It should seem then safe to conclude, in regard to the conveyance of equitable interests, that a lease for a year is used from analogy, rather than principle, or necessity; and that any interest merely equitable, as it may pass without livery of seisin may pass by a single deed, operating in the nature of a grant, and without enrolment or other external ceremony.

Persons who are merely to release a

right or title, or collateral charge, even at law, are never, merely on that account, made parties to the lease, when it is prepared with due attention to form. At the same time it is safer to make such persons parties, especially in doubtful cases, than to omit them: and in taking a release from an heir at law, in confirmation of the title of a devisee, or to supersede the necessity of proving the will; and also when former owners become parties to release some charge or incumbrance, or to afford evidence of earlier transactions; it is, in all cases, advisable to have the conveyance by lease and release, rather than a simple release of right, or a confirmation.

Under this head it is also to be called to mind, that it is of the essence of the assurance by lease and release, that the grantor in the lease for a year, when it is to operate by way of bargain and sale, through the medium of the Statute of Uses, should be a person who may stand seised to an use: hence it is necessary that the grantor should have a seisin of the inheritance, or at least of the freehold: for an use, or a trust of a term for years, will not be executed by the statute of 27 Hen. 8. The statute is confined in its operation, to those who have a seisin. It has also been said that though a corporation may give a use,

yet a corporation cannot stand seised to a use (*y*): an absurd distinction; a distinction in words, rather than substance. Thus a bargain and sale in fee from a corporation has been supported, because a corporation may give a use (*z*). It has always been doubted, whether a bargain and sale for years, from a corporation, would give a vested estate by force of the statute of uses; and hence the practice even at this day, is for corporations to convey by feoffment, or by lease, at the common law, to be perfected by entry, and a release grounded on the lease for a year, made after the completion of the lease by entry.

The general rule is, that all persons, who have a seisin of an estate of inheritance or of freehold, even without the exception of tenants in tail, may stand seised to an use. It will be sufficient then in this place to refer to the observations which may be found in other parts of this work (*a*); for the persons who may not stand seised to an use, and for a more enlarged and detailed discussion of the ground on which the disability arises.

(*y*) See *Holland and Boni's* case, 2 Leonard, 121, 122.

(*z*) 2 Leonard, 121.

(*a*) See p. 246, 252, 258, 264, 265, 267.

Of the Consideration.

3dly, As to the consideration of the lease for a year.

To every bargain and sale, it is essential that there should be a valuable consideration (*b*); it may be either money or money's worth (*c*): it is not by any means necessary, as it has been sometimes stated, that there should be a pecuniary consideration (*d*).

A horse, a rent reserved, &c. are valuable considerations, and will raise the use on a bargain and sale—hence the *reddendum* of a pepper-corn in the bargain and sale, will in the absence of a pecuniary consideration, be sufficient to answer this requisite (*e*); but friendship, affection, or the like, is not a consideration to raise a use (*f*).

To avoid confusion and any wrong conclusion from authorities, it is to be observed, that although the creation of a particular

(*b*) 1st Resolution in *Mildmay's* case, 1 Rep. 176, a. 2 Institute, 672.

(*c*) 1st Resolution in *Mildmay's* case. 1st Resolution in *Wiseman's* case, 2 Rep. 15, a. Sheppard's Touchstone, 511.

(*d*) Gilbert on Uses, 47. 58. 2 Black. Com. 4 Cruise Dig. 178. Sanders on Uses, 53.

(*e*) *Barker v. Keate*, 2 Modern Reports, 253. 1 Freem. 249.

(*f*) Shep. Touch. 511. Gilbert on Uses, 48, 253.

estate, or of a tenure, implies a consideration, and will prevent an use from resulting by application of law ; yet a mere bargain and sale for a year, or any other particular estate, will not raise or create an use in the absence of a consideration in money or money's worth : so that the difference is, that in one case, no use arises ; in the other case, as the estate is already created or vested, the use will not result (g).

Of the Grantor.

4thly, Who may be the grantor.

1. In point of estate.
2. In other respects.

This subject has in effect been already discussed. And from the former observations, it will be collected that the grantor must have a vested estate. Such estate may be either in possession, reversion, or remainder. On the other hand, it will not be sufficient that the grantor should have merely a contingent or executory interest ; either under a contingent remainder, or executory devise ; or a right or title of entry,

(g) Broke Feoffment al. Uses, 537. 2 Freem. 249. Dyer, 10. Perkins, s. 534, 535, 536, 146, b.

or a mere possibility ; or a mere chance or hope of succession, as is the case of an heir in the life-time of his ancestor.

2dly, It is necessary also that the grantor should be able to grant, so as to be exempt from the disqualifications of infancy, coverture, alienation of mind, insanity, &c. : and that a lease for a year may operate as a bargain and sale under the statute of uses, it is necessary that the grantor should be capable of standing seised to an use. On all these subjects, more detailed observations have been made, in considering who may be the releasor, in point of estate, &c. These observations are now introduced, rather with a view to the operation of the lease for a year, as a bargain and sale, than as relevant to the release as a common-law assurance.

In adverting to infancy, and its consequent inability, the case of *Zouch v. Parsons* (i) has not been forgotten. It would be well for every lawyer that such a decision had never existed to be remembered. It is a solitary case: its authority has frequently been questioned, by that sound lawyer, the present Chancellor: and it would be a singular surprise on any well read lawyer, that a case should be found,

(i) 3 Burr. 1794. 17 Ves. jun. 384.

that a grant by deed from an infant should (when a deed is essential to the assurance, and the efficient means of passing the estate) have any effect whatever. All the books make the distinction, between a feoffment, or other instrument operating by reason of livery, entry, &c. and those assurances which (like a release in enlargement of estate) operate by grant. Upon what principle is it that a feoffment by an infant in person is voidable only, while a feoffment by an infant, through the medium of an attorney, is actually void? The well-known ground is, that an attorney cannot be appointed without deed; that the deed of an infant is, with very few exceptions, void: and, as a consequence, the letter of attorney, and the feoffment grounded on the same, are actually void, and not merely voidable. No one, therefore, will ever, in practice, treat a lease and release by an infant as an assurance, on which any reliance can be placed.

5thly, Of the Words of Grant.

When a lease is made for a valuable consideration, any words are sufficient to entitle the lessee to plead the instrument as a bargain and sale. Though the words "grant,

“ demise, and to farm let,” or any of them, or any other words of the like import, commonly used in demises at the common law, are the operative words of a grant, the lessee has the election of pleading this lease as a demise at the common law, or as a bargain and sale (*a*). It was clearly agreed by the court that the words “ give for money,” “ grant for money,” “ confirm for money,” “ agree for money,” “ covenant for money,” if the deed be duly enrolled, the lands pass both by the statute of uses, and by the statute of inrolments, as well as upon the words or bargain and sale (*b*). But the most appropriate words to be used in the lease, are the words “ bargain and sell.”

6thly, Of the Grantee.

Who may be the bargainee. It will be sufficient that the person to whom the bargain and sale, or lease for a year, shall be made, should be a person capable of being a grantee, in ordinary cases, and, with a view to this particular case, capable of receiving an use. Generally speaking, every person is

(*a*) *Sir Rowland Heyward's Case*, 2 Rep. 35. *Third Resolution, Farr's Case*, 8 Rep. 94. *Bedel's Case*, 7 Rep. 40.

(*b*) 3 *Leonard*, 16.

capable of being a grantee. A monster is not capable; this instance, however, cannot be considered as an exception, since a monster is not a person. The other exception is a man professed in religion: but at this day there cannot be any profession to be noticed by law (a). The cases of a community not incorporated, as the parishioners or inhabitants of *D.* or the commoners upon such a waste, or churchwardens, are also noticed by Lord Coke as exceptions (b); but these are rather instances that such persons have no capacity in this right, or in this character. They are capable as individuals, though the law will not allow them to be grantees in a character in which they cannot have an estate, by perpetual succession. It is also to be noticed, that in the city of London, by usage in some cases, the parson and churchwardens (c), and in other places by act of parliament (d), the churchwardens, have a corporate capacity, for some purposes at least: and by various acts of parliament of modern times, persons who are not strictly corporations, have a corporate capacity, enabling them to do certain acts. All persons, even corporations, and the

(a) Co. Litt. 3, b. 132, b.

(c) Cro. Jac. 532.

(b) Co. Litt. 3, a.

(d) Stat. 9 Geo. 1. c. 7.

king, who are capable of an use, may be grantees, for their own benefit (a).

And even an *alien* may be a *cestui que use*, subject to the right of the crown to take the benefit of the use (b); but whoever was incapable of an estate, as a monk, being *civiliter mortuus*, was equally and for the same reason incapable of an use (c).

The bargainee in the lease for a year, should be the person who is to be releasee in the release. Of course, when there are to be several releases, these several persons should be bargainees. Sometimes by mistake, one person is made bargainee, and another person is named as the releasee. Under these circumstances, the release can operate only as a substantive independent grant. The bargainee may be considered as having an estate for a year, and hence the intended release may be operative, as a grant to a stranger of the reversion expectant on that term. Thus the lease for a year will be useful; not as part of an assurance by lease and release; but as creating a particular estate, and of consequence, leaving a reversion in the lessor which may pass by grant.

Suppose the transaction to be perplexed

(a) Sand. on Uses, 66.

1 Sand. 66.

(b) *Holland's Case*, Allyn,

(c) Gilb. on Uses, 44.

16, Gilb. on Uses, 43; and see

by a grant to one person, with an habendum to another person: under such circumstances, it may be supposed, the grant ought to prevail against the *habendum*. But from a late case (a), it is to be collected, that the courts will modify, in construction, the different parts of the assurance, so as to carry the intentions of the parties into effect, as far as that can be done, consistently with the rules of law. In the case under consideration, a lease for a year was made to *B.* and by an indenture dated on the following day, in consideration of the purchase-money paid by *C.* and by his direction, a grant and release were made to *C.* in fee; habendum to *B.* to uses for the benefit of *C.* The title was objected to as defective on account of the repugnancy in the deed of release. But the court decided, that in construing the conveyance, the grant which was repugnant to the habendum, should be rejected as surplusage, and the *habendum* and limitation of uses be supported.

7thly, Of the Parcels.

The lease should include all the parcels intended to be comprised in the release,

(a) *Spyce v. Topham*, 3 East, 115.

for unless the parcels are granted, and consequently described in the lease, either in terms or in effect, there will not, as to the omitted parcels, be any estate to be enlarged by the release.

It follows, that when there is any omission of parcels in the lease, the assurance cannot, as to the omitted parcels, operate as a lease and release, and therefore, as to the omitted parcels, it will be void, unless the intended release can operate in some other mode: and in this place, it is to be remembered, that every release is and may operate as a grant; but every grant is not necessarily a release, or operative as such.

When parcels are to be conveyed in the release by a full description, or even by general words, the same description, or one to the same effect, should be introduced into the lease: and when the parcels are in the release, to be granted by words of reference to a schedule, except such schedule is merely for identity, a similar schedule, as an accumulative description, should be added to the lease, or the parcels in the schedule should in that case be transcribed, as the parcels in the lease. When the parcels are granted in the release by words of reference to a more full description, contained in a recital, the parcels in the lease should be taken from the deed so recited

or at least so many of them should be taken as are to be conveyed by the release.

When the parcels are long, or the description of them is rendered complicated by words of reference, it will frequently be found convenient, and, in point of expense, highly prudent, to have the lease indorsed on the release, and to describe the parcels by means of a reference to the release. The description may be in these words, or to this effect:—"All those manors, &c. which
"are mentioned or described in the within
"written indenture or instrument; being
"the hereditaments expressed and intend-
"ed to be thereby released, or otherwise
"assured unto the said , as in the
"same indenture or instrument is particu-
"larly mentioned; and every part, &c.
"with their and every of their rights,
"royalties, members and appurtenances."
That such description would be sufficient, is a point on which no doubt can reasonably be entertained. In a transaction of considerable magnitude, a doubt was expressed, whether a reference could be made from one instrument to another instrument, to be executed at a subsequent period. This objection is not sufficiently precise to be intelligible. The force of the objection must, it should seem, arise from the terms or language of the instrument, and the want of certainty or identity. It is true, that by a

will, no reference can be made, so as to embody into the will an instrument not in existence at the date of the will: since to allow of the adoption of a future instrument, would be to take away the protection of the statute of frauds and perjuries. This subject was amply discussed in the late case of *Wilkinson v. Adams and others* (k). But reference may be made with effect, from a will to an instrument which is previously in existence (l), or to an instrument which though executed is merely *in fieri*, as a will of another person who is living. And in the case of a lease indorsed on a release already prepared, the lease does not refer to an instrument which is not in existence. The writing exists, though it does not exist as a perfect, complete, and executed instrument. On the other hand, the reference is not to the instrument as executed, but to an instrument to be executed. Is it not common and allowable by the rules of law, to enter into a bond or covenant to execute certain indentures already prepared, &c.? In the particular instance, and to obviate this objection, though its force was not felt, the parcels were taken in the lease for a year, by general words uncon-

(k) 1 Ves. and Beames, 423. v. *Seawell*, 3 Burr. 1775. *Metham v. Duke of Devonshire*,

(l) *Molyneux v. Molyneux*, Cro. Jac. 144. *Habergham v. Vincent*, 2 Ves. jun. 204. *Bond* 1 P. W. 529.

nected with, and independent of the description in the release.

Nothing is more common in practice, than to refer, by general terms, to a description in a former deed, and no doubt is entertained of the sufficiency of such descriptive terms. The rule is, "*certum est quod certum reddi potest.*" Another rule is, "*Verba relata hoc maxime operantur quod inesse videntur.*" In the form which has been given, the reference is not to the lands thereby released, so as to afford scope to the technical objection, that the lands are not released, but the reference is to the lands mentioned or described in that indenture, and as the lands are mentioned and described in that indenture, there is all the certainty which the law requires. But there is a difficulty arising from the *stamp* laws, whether reference can be made from one instrument to another, not having at that time any operative force. Even this point does not seem to be against the right to make such reference. If there be particulars of sale, it is allowable for a deed or a contract to refer to such particulars of sale, as containing the certainty of the parcels; and if there may be a reference from a deed or a contract to a particular of sale, there is not any well founded reason against a reference to parcels described in a release, intended to be executed as part of the same

assurance, with the lease for a year. The prudent course is to avoid these and similar questions of so much nicety: this may be done with great ease by adopting such general terms of description, as will certainly comprise all the lands to be included in the release.

To the parcels of the lease, the general words should, in all cases, except those of a lease by indorsement, be added; and if there be any sweeping clause, viz. general words of "all messuages, &c." these, or the substance of them, should be included in the lease.

The clause of the reversion is generally added: it is a *formal*, not a *necessary* part of this instrument. The clause of "all the estate," should uniformly be omitted. This clause is proper in those instruments only which pass all the estate of the grantor, and is informal in instruments creating a particular estate, but, though inserted, the operation of the instrument will be qualified and restrained according to the intention apparent on the instrument (*m*).

In modern practice the habendum is generally made for one year. Hence this part of the assurance is usually denominated the lease or bargain and sale for a

(*m*) *Plowden v. Cartwright*, *Derby v. Taylor*, 1 East, 502; 1 Burrow, 282; the Earl of and see p. 166 of this volume.

year. It is, however, immaterial whether the grant be for a year, or for any longer or shorter period. The only caution to be regarded, is to limit the term, so that the same may be an actual, vested, and continuing estate, capable of enlargement at the execution of the release, and not merely a future interest, or an *interesse termini*.

With a view to this caution, the lease is generally made, to hold *from the day next before the day of the date*, and it will be proper to adhere to this form. But even though the habendum were to hold henceforth, from the date, making, &c. the lease would immediately, on the execution thereof, give an estate capable of enlargement; and this is the object to be attained. For a corresponding reason, the release is generally dated on the day next after the day of the date of the lease.

But there are grounds to contend, and the point has already been noticed, that even though the lease and release should be both dated *on the same day*, they might operate as an effectual conveyance, since immediately after the execution of the lease, the lessee would have an estate capable of enlargement; and though for a variety of purposes, a day is considered as one indivisible point of time, and in the language of the law, applied to some cases, there is no fraction of a day; yet for other purposes, there

is a priority, even in an instant of time(*n*). But if the lease and release should both be dated on the same day, and the lease should be made to hold from the day of the date, which, according to the old cases, excluded the day of the date(*o*), there would formerly have been great difficulty in supporting the operation of the release as a release for want of a previous estate, capable of enlargement. Modern cases, which construe the terms from the day of the date, as exclusive or inclusive of the date, as the intention may require, would in all probability be deemed authorities to relieve a title from any difficulty on account of this informality.

In these, and all other like instances, it is proper to conform to the established practice, for the purpose of avoiding the doubts of those, who judge more from the experience they have acquired, in a fixed and determined course of practice, than from any knowledge of first principles, or who, if acquainted with first principles, are too timid to act on their authority.

As to the Reservation.

The reservation of rent is a formal and not an essential part of a lease for a year,

(*n*) Sir Robert Howard's Case, 2 Salkeld, 625. *Ex parte Pugh v. the Duke of Leeds*, Dobree, 8 Ves. jun. 82. (o) Powell on Powers, 472. Cowper, 714.

provided there be a consideration of money, or of money's worth. This clause was introduced into general practice in consequence of the determination in *Barker v. Keate* (p), that a lease made with a reservation of a rent, was, in respect of the rent, a lease for a valuable consideration, and might be used as a bargain and sale.

It follows that when there is an express or valuable consideration in the testatum part of the deed, the omission of the reddendum, or clause reserving the rent, affords no objection against the validity of the assurance as a bargain and sale.

When a rent is reserved, it should be to the bargainors of the legal estate, especially when legal and equitable owners join in the bargain and sale; or it is still preferable that the rent should be reserved generally during the term, since the law will appropriate the rent to the person to whom it ought to have been reserved (q). However, though the reddendum should be to a stranger, or to a person not seised of the legal estate, still the reservation to be paid in the name of rent would be, it should seem, a sufficient consideration to support the deed as a bargain and sale, since the payment of a considera-

(p) 2 Mod. 249.

(q) *Whitlock's Case*, 8 Rep. 69, b.

tion to a stranger will support a bargain and sale from the owner.

The rent generally reserved is a peppercorn ; but it may be a grant of wheat, or the like.

Of the Declaratory Clause.

The declaratory clause, expressing the intention with which the lease is made, is also a formal, and not an essential part of the assurance. Of course the omission of it would not invalidate the instrument, while a due observance of practice will suggest the propriety of its insertion.

This clause is declaratory of the motive or purpose for which the lease for a year is made. It generally runs in these terms :—

“ To the intent and purpose, that by
“ virtue of these presents, and of the statute
“ for transferring uses into possession, the
“ said *A. B.* may be in the actual possession
“ of the premises, and be thereby enabled to
“ take and accept a grant and release of the
“ freehold, reversion and inheritance of the
“ same premises to him, his heirs and as-
“ signs for ever, to the only proper use and
“ behoof of himself, his heirs and assigns,
“ for ever, by an indenture already prepared,
“ and intended to bear date the day next
“ after the day of the date of these presents,

“and to be made between, &c.” or, in ~~this~~ form :

“To the intent, that by virtue, &c.”
[*as before*] “the said *A. B.* and *C. D.* may be
“in the actual possession of the premises,
“and be thereby enabled to accept a grant
“and release, &c. [*as before,*] to the uses,
“upon the trusts, and for the intents and
“purposes to be declared by an indenture
“already prepared, and intended to bear
“date, &c. and to be made, &c.”

This clause calls for one observation, it follows the language of practice, in assuming the object to be, to put the lessee in the actual possession. This expression, and the practice on which it is grounded, must be understood as a reference to the operation of the statute for transferring uses into possession. By possession, is meant only estate. The lease for a year, or bargain and sale, cannot, by its own operation, give to the lessee or bargainee the actual possession. It accomplishes nothing more than to give him an actual estate. This may be an estate entitling the lessee or bargainee to the right of immediate possession, or to an estate conferring a remainder or reversion expectant on some estate previously subsisting, or it may from its language give a future executory interest. Though the bargain and sale may be by a person who has the possession, the possession will not

be changed without an entry by the lessee or bargainee, even when the bargain and sale is to be from a day which is past, or henceforth, &c. &c. At the common law the lessee had not any estate till entry: under the bargain and sale he has an estate immediately on the execution of the bargain and sale, and before entry, provided the bargain and sale is to hold from a day past, or from the execution. But the bargainee cannot maintain an action of trespass, or be considered as in the actual possession of the land, until he has entered by virtue of the bargain and sale (b).

With every disposition to encourage an observance of established forms, it is to be lamented that any expression should have been adopted for this or any other instrument, which might lead the student to an inaccurate conception of the true meaning of the expressions which are used. Some other expression, showing that the lessee was to have *an actual vested estate*, as contradistinguished from an actual possession, would have more adequately described the object of the lease for a year, and possibly might have been a protection against those errors into which not only students, but even men of extensive knowledge in the profession, who have undertaken to write on the subject of this as-

(b) *Barker v. Keate*, 2 Mod. Rep. 251.

surance, have been led:—how just is the maxim, *ignoratis terminis; ignoratur et ars*, and the other maxim, *nomina si perdas certe distinctio rerum perditur*.

Of the Lease and Release.

It will now be proper to treat of the parties to a release, and the formal parts of this assurance.

As a deed is of the essence of a release, it follows, that no one except those who can grant by deed can effectually grant by a release, and that the release must be made by deed.

It frequently happens that the release forms one only of the assurances contained in a deed. The deed may have other objects besides the release, consequently other parties besides the releasor may be necessary to give effect to these objects: as far as respects the release itself, it will be sufficient that the intended releasor and releasee should be parties.

The formal parts of the deed, independent of other circumstances, are

- 1st, The date.
- 2dly, The clause which names the parties.
- 3dly, The testatum clause.
- 4thly, The recital of the lease, or bargain and sale for a year.

- 5thly, The parcels and exception.
- 6thly, The habendum.
- 7thly, The declaration of use.
- 8thly, Sometimes the declaration of trust.
- 9thly, The covenants.

1st. *Of the Date.*

In modern practice, the lease and release, as has already been observed, are parts of the same assurance. The release is generally dated on the day next after the day of the date of the lease for a year: this order of date is not absolutely necessary. On that point some observations have been offered in considering the circumstances, which, in regard to the date, are to be observed in the lease for a year. From the authorities which have been cited, it is also obvious that the release may be a transaction totally independent of a lease for a year, prepared for the purpose of being a foundation for the release. An estate for years or life, though created at any period, however remote, and without any view to an enlargement of the estate of the lessee or bargainee, is equally capable of enlargement as if the estate had been created, as is the case in modern practice, immediately before the release, for the sole purpose of being enlarged.

2dly, *The Clause which names the Parties.*

Of the parties some notice has already been taken. It remains only to be added, that care should be taken to designate with sufficient certainty, the persons who are to be parties.

The general rule to be remembered in this place is, that no one can grant by a deed, or take an immediate estate under the deed, unless he be a party to the deed (c). But a person may take a remainder (d), or an use (e), or the benefit of a trust under a deed, without being a party to it. In a deed-poll (f), a person becomes a party merely from the circumstance of being named as the person by whom, or to whom, the grant is made. With reference to *indentures* between parties, it seems to be a general rule, that no one can be considered as a party to a deed, unless he be named as a party in the clause, containing the names of the persons who are formally made parties. Thus, in the instance of an indenture, expressed to be made between A. of the one part, and B. of the other part, C. could not take an *immediate* estate, or be a grantor or a grantee, or a cove-

(c) Co Litt. 231, a.

(d) lb.

(e) *Samma's Case*, 13 Rep. 55.

(f) 1 Inst. 526.

nantor or covenantee, because he was not named among the parties. That a remainder may be good to a person who is not a party to a deed, is the express language of Lord Coke, and of all the authorities. The proposition of Lord Coke (g), confirmed as it will be by several passages from other authors, is,

“ And albeit, he in the remainder be no
“ party to the indenture (the parties there-
“ unto only being the lessors and the te-
“ nants for life), yet when he in remainder
“ entereth and agreeth to have the lands by
“ force of the indenture, he is bound to
“ perform the conditions, contained in the
“ indenture: and here is also a diversity
“ to be understood, that any stranger to
“ the indenture may take by way of re-
“ mainder, but he cannot in this case take
“ any present estate in possession, because
“ he is a stranger to the deed.”

The cases applicable to this division involve minute distinctions and technical niceties; and it will be proper to observe, that there are three classes of deeds:—

1st, Indentures introducing the *actores fabule*, as parties, in this form, or to this effect:

“ This indenture, made, &c. between *A. B.*
“ of the one part, and *C. D.* on the other
“ part.”

(g) 1 Inst. 230.

2dly, Deeds indented, and which without naming any person as parties, begin with these or the like terms :

“ It is agreed, &c. that, &c.” without naming any person as parties to the agreement ; merely bringing different persons to act in different characters, as circumstances and their interest, or the intention may require.

3dly, Deeds-poll, which commence with words to this, or the like effect :—

“ To *all Christian* people, or to all persons
“ to whom these presents shall come or be
“ shown, *A. B. &c.* sendeth greeting ; or
“ know ye that *A. B. &c.* hath, &c.”

These different classes of deeds give occasion to different conclusions. First, when an indenture is made between parties, the general rule that no one can take as an immediate grantee under a deed, or be a grantor, covenantor, or covenantee, unless he be named as one of the parties in the deed, is true. This rule is to be collected from Lord Coke, in the 2d Inst. 673, who states this case :

“ In action of debt between *Scudamore*
“ and others, plaintiffs, and *Vandenstene*, de-
“ fendant, upon an indenture of charter-party,
“ the case was thus : The indenture of char-
“ ter-party was made between *Scudamore* and
“ others, owners of the good ship called *B.*
“ whereof *Robert Pitman* was master, on the

“ one party, and *Vandenstene* on the other party.
“ In which indenture, the plaintiff did cove-
“ nant with the said *Vandenstene* and *Robert*
“ *Pitman*, and also *Vandenstene* covenanted
“ with the plaintiff and *Robert Pitman*, and
“ bound themselves to the plaintiff and
“ *Robert Pitman* for the performance of cove-
“ nants in six hundred pounds ; and the con-
“ clusion of the said indenture was, ‘ In wit-
“ ness whereof the said parties abovesaid
“ to these present indentures have put
“ their seals’—and the said *Robert Pitman*
“ to the said indenture put his hand and
“ seal, and delivered the same. The defen-
“ dant in bar of the said action pleaded the
“ release of *Pitman*, &c. whereupon the plain-
“ tiff demurred, and it was adjudged, that
“ the release of *Pitman* did not bar the plain-
“ tiff, because he was no party to the inden-
“ ture—and the diversity was taken and
“ agreed between an indenture reciprocal be-
“ tween parties on the one side, and parties
“ on the other side, as this was ; for there no
“ bond, covenant, or grant can be made to
“ or with any that is not a party to the deed.
“ But where the deed indented is not réci-
“ procal, but is without a between, &c. as
“ *amnis Christi fidelibus*, &c. there a bond,
“ covenant, or grant, may be made to divers
“ several persons.”

The same case is reported by the name

of *East, Skidmore, and Froame, v. Vandstevan*, by *Croke (h)*, thus: "Covenant for not performing certain conditions in an indenture between the plaintiffs, master of the good ship *A.* of which *Robert Pitman* was owner, of the one part, and the defendant on the other part, and the conclusion of the indenture was, *in cujus rei testimonium*, the parties aforesaid to these presents have set their hands and seals, and all the plaintiffs, and the said *Robert Pitman*, set their seals to one part; and the defendant to the other part: and in the indenture there were divers covenants to be performed by the plaintiffs, and by the said *Robert Pitman* to the defendant, and *è converso*; and there was a clause in the indenture that the plaintiffs and the said *Robert Pitman* bound themselves to the defendant to perform the covenants; the defendant pleads that the indenture was delivered to the plaintiffs, and the said *Thomas Pitman* (and so mistakes *Thomas* for *Robert*) pleads the release of the said *Thomas* of all covenants: and thereupon the plaintiffs demurred for two causes:—

"1st, The release was pleaded by *T. P.* whereas no such man was named in the indenture, and this was held a great mis-

“ take and without defence ; and the roll
“ was commanded to be searched.

“ 2d, And the chief matter was, admitting the name had been right pleaded, and
“ that *Robert Pitman* had released, if this
“ release was good. Coke argued that forasmuch that only the plaintiffs in the premises of the indenture were parties of the
“ one part, and the defendant of the other, although *Robert Pitman* is afterwards named
“ in the deed, it is a void deed as to him,
“ and no covenant made to him or by him
“ is good, for he is a stranger to it, and his
“ sealing and delivery is not material : as if
“ *I. S.* by indenture between him of the one
“ part, and *I. D.* of the other, demiseth lands
“ to *I. D.* and *A. B.*, it is void to *A. B.* ;
“ and he answered the case as put by Godfrey of the other side, 4 Edw. 2. obligation ; (an obligation was made by *I. S.* and
“ *ad majorem rei securitatem inveni I. D. fide jussorem*, and *I. D.* put his seal to it : this
“ was his deed). Which case he agreed ; for it
“ is not mentioned whose deed it is ; and so it
“ is the deed of both, which are named and
“ aut their seals, &c. So when an incumbent grants a rent by the assent of patron
“ and ordinary, and they put their seals to it,
“ this is not their deed, but only their agreement to it. And the case of 39 Edw. 3.
“ c. 9, is upon the same reason of 4 Edw. 2.

“ And in Michaelmas, 29 and 30, it was
“ adjudged for the plaintiffs, and the prin-
“ cipal cause was, the misnomer, which the
“ court held could not be amended. But
“ Wray said, they conceived the matter in
“ law to be also for the plaintiffs.”

And in the First Institute (i), this passage may be found: “ And it is to be known
“ that a deed of feoffment, beginning, *omni-*
“ *bus Christi, fidelibus, &c.* or *sciant presentes*
“ *et futuri, &c.* or the like, a letter of attor-
“ ney may be contained in such a deed;
“ for one continent may contain divers
“ deeds to several persons; but if it be by
“ *indenture* between the feoffor on the one
“ part, and the feoffee on the other part,
“ there a letter of attorney in such a deed,
“ is not good, unless the attorney be made
“ a party in the deed indented.”

However, on the rule *communis error facit jus*, it has been decided that even in an indenture between parties, an attorney may be appointed to deliver seisin, although the attorney be not named as one of the parties to the indenture.

Thus in trespass (k) upon evidence, it was moved by Coke, attorney-general, where an indenture of bargain and sale between *I. S.* on the one part, and *J. D.* on the other

(i) 1 Inst. 626.

(k) Cro. Eliz. 905.

part, and in the end thereof, a letter of attorney to *J. M.* to make livery, was produced in court, that it should be void, because the attorney was not party to the deed. But all the court held it to be good enough; for in many such indentures are such letters of attorney made, and it is a common assurance, and therefore good.

The same point is reported by Noy (*k*) in these terms:

“ Upon evidence, it was moved by Cook,
“ that an indenture of feoffment, and letter
“ of attorney in it, is not good to a stran-
“ ger to make livery. But otherwise of a
“ deed-poll, because in that twenty men
“ may be made parties one after another.
“ But in an indenture, those between whom
“ it is made, only are parties to it. But
“ by the court that it is good enough, and
“ that it is a common case and a common
“ use.”

This decision or opinion, so far from ruling the general doctrine, treats a case appointing an attorney as an exception to the general rule. That rule is illustrated, and even proved, by the cases to be now introduced.

In *Windsmore*, lessee of *Edward Long*, plaintiff, v. *Nicholas Hobart* (*l*), defendant,

(*k*) Noy, 49.

(*l*) Hob. 313.

an ejectment was brought for land in Polsholt, in the county of Wilts; and it was found by special verdict that William Lord Sturton was seised in fee, and that 24 *May*, 8 *Hen.* 8, by his certain writing indented, sealed with his seal, he granted to one Thomas Hobart, the tenements aforesaid, to hold to the said Thomas, and to the aforesaid Nicholas Hobart, and to John Hobart, and Henry Hobart, the sons of the aforesaid Henry, for their lives, and the life of the survivor of them successively; the said William Lord Sturton granted the reversion to Thomas Long, and his heirs, who devised the reversion to Edward Long, the lessor, in tail, and died; Thomas Hobart and Henry Hobart died, and Nicholas and John survived, and the lessor entered, and made the lease to the plaintiff, and the defendant entered.

And in this case judgment was given for the plaintiff after long debate, and upon great consideration, whereof the reasons were; first, that none could *take* by the deed immediately, but Thomas Hobart because he was only *party* to the deed, and the rest not named but by the *habendum*, then they cannot take but by the way of remainder, which cannot be joint, because of the words *successive*, &c. And in succession they cannot take for the uncertainty who shall begin, and who shall follow;

which in the case, 20 El. Dyer, is ascertained by the clause *successive, sicut nominantur in charta*.

Again, in *Greenwood v. Tyler (m)*, *Anthony Long*, and *Alice* his wife, were seised in fee, in right of *Alice*, of the tenements in which, &c. and being thus seised, on the 20th August, anno 2 Ed. 6. an indenture was made between the said *Anthony Long*, and *Alice* his wife, of the one part, and one *John Fisher* of the other, and thereby the said *Anthony Long* and *Alice* his wife, demised and to farm let by indenture to the said *John Fisher* and *Anne* his wife, and *Johanna* their daughter, the tenements in the count mentioned: To hold the said tenements to *John Fisher*, and *Anne* his wife and *Johanna* their daughter, and the longer liver of them successively, from the feast of *St. Michael* the archangel, thence next ensuing, the date of the said indenture, until the end and term of their natural lives; paying therefore annually during their lives as aforesaid, the yearly rent of thirteen shillings and fourpence, with an heriot of, &c. with a covenant on the part of *John Fisher* and his wife, and *Johanna* their daughter, to pay all free rents and other charges and duties issuing out of those

(m) Hob. 314.

lands during their lives as aforesaid, before the feast of *St. Michael* aforesaid; and the said *Anthony Long* and *Alice* his said wife, delivered seisin in person to the said *John* and *Anne* his wife, and *Johanna* their daughter, according to the form and effect of the said indenture.

In the King's Bench upon a great debate of this cause, these points, among others, were resolved.

That *Anne*, the wife of *John Fisher*, and *Johanna* their daughter, could not take a joint estate with *John Fisher* by the said indenture of lease, because the said *Anne* and *Johanna* were not made parties to the said indenture, according to the case of *Winsmore* and *Hobart* then cited. And that *John Fisher* did not take any greater estate than for his own life, and not for the lives of himself, *Anne* his wife, and *Johanna* their daughter, because those two were intended to take an estate to themselves, and, on that account, their names or lives should not be a limitation to, or increase the estate of *John Fisher*, against the intention of the deed.

The case of *Gilby v. Copley* (n), affords a large portion of useful information and material distinctions on this subject. The observations

(n) 3 Lev. 138.

of *Levinz*, to be found in that case, do not appear to have been contradicted. All the authorities agree, that even in an indenture made between parties, a person may take by way of remainder, although he cannot take as an immediate grantee; and we also find these distinctions propounded in the following terms, viz.

In *Gilby v. Copley*, in an action of debt, the declaration stated that the defendant, by his certain deed, had promised to pay two hundred and ten pounds on the 16th of June next ensuing, for four hundred and forty-eight sheep, to the plaintiff, belonging to her as the executrix of her father, and sold to the defendant by *Thomas Waiver*, on the part of the plaintiff, as by the aforesaid writing appears, and that the defendant had not paid it. The defendant demands oyer of the deed, which is entered in these words: "Articles of agreement made between "*Thomas Waiver*, who is fully authorized "on behalf of *Elizabeth Gilby* (the plaintiff) executrix to her father, as also on the "behalf of *William Saville*, who is trustee "on behalf of the children of the plaintiff's "father on the one part, and *Lionel Copley* " (the defendant) on the other part, 16th "May, 1682." In the first place, *Thomas Waiver* covenants, for the consideration after mentioned, that the defendant shall

enjoy the close called the *Sunke*, for eight years from Lady Day last past, the lessors to be at the charge of repairing the banks.

Item, The said *Thomas Waiver* hath sold to the said *Lionel Copley* four hundred and forty-eight sheep belonging to the said *Elizabeth Gilby*, as executrix to her father, being now upon the *Sunke*; in consideration whereof the said *Lionel Copley* hath paid in hand a shilling to the said *Waiver*, and doth covenant to pay seventy pounds rent for the *Sunke* for the first year, and for the second year one hundred pounds, at two equal payments, and the lessors shall have liberty to embank the *Sunke*; and the said *Elizabeth* may sell the bricks, unless she agree to sell them to *Copley*.

And further, the said *Lionel Copley* doth promise (not said to whom), to pay to *Elizabeth Gilby*, two hundred and ten pounds for the said four hundred and forty-eight sheep on the sixteenth of June next following. And then the defendant demurs upon the declaration. And it was argued by *Pemberton*, serjeant, for the defendant, that the action ought to be brought in the name of *Waiver*, and not in the name of *Elizabeth Gilby*. The articles were made between parties, and she not being a party to them, could not sue for, nor release any thing contained in those articles, as might be done if it had been a deed-poll, and not

between parties; and cites, Co. 2 Inst. 673. *Scudamore's case*: Bigland, serjeant, contra.

The contract being on the behalf of *Elizabeth Gilby*, only as to the suit for the sheep, and the promise being general, and not to any person certain, she for whose benefit that was done, shall sue for it; and cites *Dutton and Poole's case*, lately adjudged in the King's Bench, where the son promised to pay his father one thousand pounds immediately, in consideration that the plaintiff should forbear the felling of timber growing on his land; the action was brought by the sister, and adjudged properly brought by all the court. And of this opinion were Jones and Charleton, strongly upon the first argument: and to this Windham was inclined; this bargain being made on the behalf and for the benefit of *Elizabeth*, she could bring the action, and the deed not being indented, would be no impediment or estoppel.

But Justice Levinz, contra; and he said, that the indenting or no indenting of the deed is not material; but the being or not being a party is material. It is common doctrine that one who is not a party to a deed made between parties, cannot take by that deed, except by way of remainder; and he cited a case between *Cooker and Child*, adjudged by Hale, and all the

Court(o): when an action was brought upon a charter-party, which was this. This indented charter-party witnesseth, that *Baily*, master and part owner of the ship, with consent of *Cooker*, the other part owner, hath let the ship to *Child*, for such a voyage; and *Child* covenants with *Baily*, and also with *Cooker*, to pay 300*l.* *Cooker* brings the action, and the defendant *Child* pleads, that only he and *Baily* were the parties to, and sealed the indenture: whereupon the plaintiff demurred, and by all the court, “although that the deed was by indenture, “still not being *between parties*, a covenant “in that could not be made with a stranger, “if it had been a deed poll, or in the first “person, Know ye, that I, &c. otherwise if “it had been made between parties; there “no stranger could take advantage upon that “by way of action:” and there the case of Co. 2 Inst. was cited by Sir William Jones at the bar, and affirmed by the court to be good law. And here the deed could not be in execution of an authority; for then it ought to have been made in the name, and sealed and subscribed with the name of the master. And to the case of *Dutton and Poole*, that was in assumpsit on a verbal promise, and not founded upon a deed as

(o) Hil. 24, 25 Car. 2. B. R. sed. intrat. Trin. 24 Rot. 663.

this is. And he cited also the case of *Offly and Ward*, in King's Bench, Hil. 19 & 20 Car. 2. Debt by *A.* upon a single bill made to *A.* by the defendant to the use of *A.* and *B.* *A.* brings an action, to which the defendant pleads a release by *B.* and adjudged no bar; for he being a stranger to the bill could not release it, although it was for his own use; and the book of Edw. 4. which says that if a bill or bond be made to *A.* to the use of *B.*, that *B.* could bring an action on it, was denied to be law. But 3 Cro. 729. *Shaw v. Sherwood*, is allowed to be law, where a bill sealed was such: "Received of *A.* "to the use of *B.* equally to be divided, to "be repaid at such time as shall be most for "the profit of *B.* and *C.*" each may sue for his 20*l.*, for the deed is not made to either. But if it had been an obligation to *A.* for the payment of 20*l.* a piece to *B.* and *C.* neither of them could have sued for it, but the suit must be in the name of *A.* And the said case was affirmed in a writ of error, as appears in Yelv. 23. But in the principal case, *curia advisare vult*; and I suppose that the parties agreed, for I never heard of it afterwards.

In Newnam on Conveyancing (*p*), the

points are thus collected, though not very correctly.

If there be *two* grantees, and one of them takes by deed, it is sufficient (*q*) ; but if the grant be to one that is *no party* to the deed, and not the grantee himself, in this case although the grantee, and he to whom the grant is made, be capable, and never so well described by their names, yet is the grant void ; for no grant can be made but to him that is party to the deed, except it be by way of remainder : and therefore if a man makes a lease for term of life, and after the lessor grants to *a stranger*, that the tenant for life shall have the land to him and his heirs ; this grant is void *et sic de similibus* ;— and it seems in some cases, that if one of the grantees be party to the deed, that another grantee, that is no party to the deed, may take with him ; and therefore the case was, Robert gave the reversion of the lands which Agnes his wife held for her life to “ *Stephen de la Moore, habendum post mortem dictæ Agnetis in liberum maritagium, cum Johanna filia ejusdem Roberti* :” in this case it was adjudged that although Joan was not

(*q*) Thereby meaning that a qualification, or from the form of the instrument, is good to the one.

named before the habendum, yet that she should take in tail with her husband (r).

It is however to be observed, that *Stephen Moore's case* (s) turned on the peculiarity of a gift in frankmarriage. Lord Coke treats it as a remarkable case (t); and Herle put the case on the point of the form of a gift in marriage, namely, "*quod talis dedit tali in liberum maritagium cum tali filia sua;*" and there the wife takes with her husband.

Besides, it cannot be collected that the gift was made by an indenture between parties. The singularity of the case is, that the wife takes by implication, rather than from a grant to her in express terms; and hence Lord Coke's observation, in fo. 21. "albeit the gift is made of the lands to the man with his daughter, &c." yet is the gift good to *both* of them in special tail: and he adduces *Stephen de la Moore's case* as an authority for that position.

In *Nurse v. Frampton* (u), there was a deed and not an indenture. In its form it stood thus. It was agreed that a grey nag, &c. it witness whereof we have hereunto set our hands and seals; and the court in answer to

(r) Cites Doctor and Student,
94. Co. Litt. 21. 231. 5 Ed. 3,
17.

(s) Year Book, 3 Ed. 3. 17.

(t) fo. 21. a.

(u) 1 Salk. 214.

the authority of 2 Inst. 673. 3 Cro. 59. and 2 Roll. 22. held that the cases were not alike, and that an action would lie by the bare signing and sealing.

By several authorities, and by the general rule, it is settled that in a deed poll, a person may be a grantor or grantee, a covenantor or covenantee, merely by being named as an efficient party either actively or passively, in the deed.

Lord Coke (*t*) further opens the point of this learning in commenting on Littleton. The text is—

“ Also if an estate be made by *indenture* (*u*)
 “ to one for term of his life, the remainder
 “ to another in fee upon *a certain condition*,
 “ &c. and if the tenant for life have put his
 “ seal to the part of the indenture, and
 “ after dieth, and he in remainder entereth
 “ into the land by force of his remainder,
 “ &c.: in this case he is tied to perform all
 “ the conditions comprised in the inden-
 “ ture, as the tenant for life ought to have
 “ done in his life-time, and yet he in the
 “ remainder never sealed any part of the
 “ indenture. But the cause is, for that
 “ inasmuch as he entered and agreed to have
 “ the lands by force of the indenture, he is.

(*t*) 1 Inst. 230, b.

(*u*) See s. 375. as to deeds poll.

“bound to perform the conditions within
“the same indenture, if he will have the
“lands, &c.”

And the comment is, “albeit he in the
“remainder be no party to the indenture,
“ (the parties thereunto only being the lessor
“and the tenant for life) yet when he in re-
“mainder entreth and agreeth to have the
“lands by force of the (v) indenture, he is
“bound to performe the conditions con-
“tained in the indenture. And here is also
“a diversity to be understood, that any
“stranger to the indenture may take *by way*
“of remainder, but he cannot in this case
“take any present estate in possession, be-
“cause he is an estranger to the deed.”

And Lord Coke continues to observe,
“if *A.* by deed indented betweene him and
“*B.*, letteth lands to *B.* for life, remainder
“to *C.* in fee, reserving a rent, tenant for
“life dieth, he in the remainder entereth into
“the lands, he shall be bound to pay the
“rent; for the cause and reason before
“yielded by Littleton. An indenture of
“lease engrossed betweene *A.* of the one
“part, and *D.* and *R.* of the other part,
“which purporteth a demise for yeares by
“*A.* to *D.* and *R.*, *A.* sealeth and delivereth

“ the indenture to *D.*, and *D.* sealeth the
“ counterpart to *A.*, but *R.* did not seal and
“ deliver it. And by the same indenture it
“ is mentioned, that *D.* and *R.* did grant to
“ be bound to the plaintiff in twenty pounds
“ in case that certain conditions comprised
“ in the indenture were not performed. And
“ for this twenty pounds *A.* brought an
“ action against *D.* onely, and showed forth
“ the indenture. The defendant pleaded,
“ that it is proved by the indenture, that
“ the demise by indenture was made to *D.*
“ and *R.*, which *R.* is in full life, and not
“ named in the writ. Judgment of the writ.
“ The plaintiff replied that *R.* did never
“ seale and deliver the indenture, and so his
“ writ was good against *D.* sole. And there
“ counsell for the plaintiff tooke a diversitie
“ betweene a rent reserved which is parcell
“ of the lease, and the land charged there-
“ with, and a summe in grosse, as here
“ the twenty pound is; for as to the rent,
“ they agreed that by the agreement of *R.*
“ to the lease, he was bound to pay it; but
“ for the twenty pounds that is a summe in
“ grosse, and collateral to the lease, and not
“ annexed to the land, and groweth onely
“ by the deed, and therefore *R.*, said he,
“ was not chargeable therewith, for that he
“ had not sealed and delivered the deed.—
“ But inasmuch as he had agreed to the

“ lease, which was made by indenture,
 “ he was chargeable by the indenture for
 “ the same summe in grosse; and for that
 “ *R.* was not named in the writ, it was ad-
 “ judged that the writ did not abate.”

“ So where three were enfeoffed by deed,
 “ and there were several covenants in the
 “ deed, on the part of the feoffees, and only
 “ two of the feoffees sealed the deed, the
 “ third entered and agreed to the estate con-
 “ veyed by the deed, he was bound in a
 “ writ of covenant by the sealing of his
 “ companions. 2 Roll. Rep. 63. In 38
 “ Edw. 3. p. 9. it is said, that if land be
 “ leased to two for years, and only one puts
 “ his seal, but the other agrees to the lease,
 “ and enters and takes the profits with him,
 “ he shall be charged to pay the rent, though
 “ he has not put his seal to the deed; but
 “ if there be a condition comprised in the
 “ deed which is not *parcel of* the lease, but a
 “ condition in gross, if he does not put his
 “ seal to the deed, though he be a party to
 “ the lease, he is not party to the condi-
 “ tion (*w*).”

And it remains to be added, that in
Salter v. Hedgly (*x*), Lord Chief Justice
 Holt held that a party to a deed cannot
 covenant with one who is no party to it;

(*w*) Note to 1 Inst. 231. b.

(*x*) Carth. 76.

but that one who is no party to the deed may covenant with one who is a party, and oblige himself by sealing of the deed.

The case was to this effect :

In covenant, &c. the plaintiff declared that (the defendant) by a certain writing made (at such a day and place) the counterpart of which is sealed with the seal of *Ridgly* himself, and this is produced in court, reciting as followeth: *imprimis* (here all the deed was recited) and the breach assigned was, that one *Rock* had not paid rent to the plaintiff.

The defendant craved oyer of the deed, which was entered in these words, and it was to the effect following, (*viz.*) “ Articles
“ of agreement made between *John Salter*,
“ of the one part, and *Charles Rock* of the
“ same county, baker, (but did not say of
“ the other part) as followeth; *imprimis*.
“ That the said *John Salter* doth for himself,
“ his heirs and assigns, set and let one
“ house or tenement called, &c. unto the
“ said *Charles Rock* for the yearly rent of,
“ &c. payable quarterly. And whereas
“ the aforesaid *Charles Rock* hath agreed
“ and taken the house aforesaid, paying the
“ rent quarterly, and leaving it in good
“ repair; and that the said rent may be
“ satisfied as aforesaid, be it known unto
“ all men, that *I, John Ridgly*, do covenant

“ for myself, &c. on the behalf of the said
 “ *Charles Rock*, that is to say, that the said
 “ *Charles Rock* shall pay the rent, and per-
 “ form the other covenants, &c.” reciting
 them particularly, &c. which deed was
 sealed by *Rock* and *Ridgely*: and after oyer,
 the defendants demurred generally.

And it was argued for him that he was
 not bound by this covenant, because he
 was not a party to the deed; and it is a
 rule in law, that he who is not a party
 to the deed, can never give or take any
 thing, &c. except it is by way of remain-
 der, which is not this case; and for autho-
 rities in point the cases in the margin were
 cited (*y*).

It was argued for the plaintiff that this
 deed was in the nature of two deeds, upon
 one and the same piece of parchment (which
 might very well be, as it was agreed on all
 sides), and therefore the defendant shall be
 obliged by it; and it doth not appear in this
 case, whether the deed was indented or not,
 so that if it is taken as a deed of the first
 person, and a stranger, he may be very well
 obliged by such a deed to have any thing
 performed as a *fide jussor*, which in former

(*y*) 3 Cro. 56. *Skidmore v.* 352. Roll. 72. See Lev. 138.
Vandevestan, 2 Inst. 673. 2 *Gilby and Copley*. 2 Lev. 74.
 Roll. Abr. 220. 2 Cro. 359. *Cooker v. Child*.
Goodman v. Knights, 1 Inst.

days was a customary form; and to prove this were cited the cases in the margin (z). And it was also said one who is not a party to the deed may be made an attorney by the deed itself, to make livery and seisin upon a feoffment (a). And where an attorney is made by a deed to which he is a stranger, the deed itself may be by indenture as well as by deed poll.

And in addition to the point so ruled by Holt, Chief Justice, the court was clear in opinion that the action did lie against the defendant upon this deed.

And it is to be observed that this case arose on an instrument which was not indented; and hence the observation of Holt, Chief Justice, as found in a report of the same case, viz. "This doth not appear to be an indenture: it is *per quoddam scriptum fact, &c.*" In Shower's Report the opinion of Holt, Chief Justice, is stated in these terms: "Why cannot a man oblige himself by a deed, if there be express words for it, and he seals it? Suppose at the end of an indenture it be, 'And be it known unto all men, that A. B. for himself covenant, &c.' and he seals it, why not this oblige him? A man cannot take immediately where he is not a party;

(z) 40 Ed. 3. 5. Fitz. Ab. Tit. Oblig. 16. F. N. B. 146. b.

(a) 1 Inst. 52. b.

“ but where do you find that a man cannot
“ give without being a party? In a deed of
“ feoffment, a warrant of attorney to *A.* not
“ a party, is good now, though formerly held
“ to be otherwise.”

To resume the general observations on this head, it is usual with some gentlemen in describing the parties to arrange them under different heads, according to the different characters, or the circumstances under which they are to act or to grant. For instance, when *A.* is a beneficial owner, and also a trustee with *B.*, they make *A.* a party of the first part, and *A.* and *B.* parties of the second part; and they observe a like course when one person is to take estates, or receive benefits under different characters, or in different modes; for example: when *A.* is to be a trustee jointly with *B.* of one estate, and a trustee jointly with *C.* of another estate, they make *A.* and *B.* parties in one clause, and of one part, and *A.* and *C.* parties in another clause, and of another part.

There is an accuracy in this mode of practice, since it opens to the mind the different operations of different parts of the deed. It also facilitates the remembrance of the different characters in which the parties are acting. But the rule of law does not require this or any other like arrangement

of the parties. Though *A.* and *B.* are parties only in one clause, they may be grantors or grantees, covenantors or covenantees, either jointly or severally; and although they are named jointly, and the grant be to one of them separately, or the nomination of the other be a mere dead letter, still the deed will not be in any manner invalidated

3dly, Of the Testatum Clause.

In the testatum clause it is usual to express the consideration for which the release is made; and the mode of expressing the consideration must be governed by circumstances, so as to adapt the language of this part of the instrument to the facts and the intention of the parties.

By the rules of the common law no consideration is necessary to the validity of a release, or of any other deed. The consideration is added, for the purpose only of shewing the equitable title, or rebutting the presumption which would raise a resulting use or resulting trust, or to shew on the internal evidence of the deed, that the deed was not voluntary, &c. so as to be fraudulent against creditors or subsequent purchasers.

That there may be a resulting trust under a conveyance by lease and release, for want of a consideration, is perfectly clear: whether

there may be a resulting use, is a point which requires more minute investigation; and on that point, some observations will be afforded in the division which respects the declaration of use.

Sometimes the consideration is merely nominal.—In that case the receipt is acknowledged very briefly by the words “the receipt whereof is hereby acknowledged;” and when the nominal consideration is paid to several persons, the clause should be in this form or to this effect:—“the receipt whereof respectively they do hereby respectively acknowledge;” or thus, “the receipt of which said sums of and to the said respectively paid as aforesaid, they respectively do hereby acknowledge.”

When a full and valuable consideration is paid, the receipt for the consideration should be expressed more fully as in the subjoined clauses, and these clauses should vary according to the mode in which the consideration is to be paid. The form in which the consideration is expressed, and of these receipts are now to be added.

1. A simple Form of Consideration paid
by one to one.

*In consideration of £ of lawful money
of the united kingdom of Great Britain and*

*Ireland, current in Great Britain, to the said
 , as the executrixes of the will of the said
 , well and truly paid by the said
 , immediately before the execution of these presents, with the privity, consent, and approbation of the said
 , the husband of the said
 , and in full for the absolute purchase of the said
 and the fee-simple and inheritance thereof; The receipt of which said sum of
 they the said do hereby acknowledge, and of and from the same sum and every part thereof, do hereby acquit, release, and for ever discharge the said
 , his heirs, executors, administrators, and assigns, and every of them.*

When the Consideration is paid by several to several in certain Proportions.

And in consideration of the sum of £ of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, paid by the said and in equal moieties, immediately before the execution of these presents to the said J. P. and M. his wife, and F. and G. in the proportions hereinafter mentioned (that is to say), as to the sum of £ being one moiety or equal half part of the said purchase money, or sum of £ to the said J. P. and M. his wife, or one of

them. And as to the sum of £ being one fourth of the said purchase money or sum of £ to the said F.; and as to the sum of £ being one other fourth part and residue of the said sum of £ to the said G. in full, for the absolute purchase of their respective shares of and in the said messuages, &c. hereby released or otherwise assured or intended so to be, and the fee simple and inheritance thereof with the appurtenances; The receipts of which said several sums of £ and £ and £ , making together the sum of £ to the said J. P. and M. his wife, and to the said F. and G. respectively paid as aforesaid, they the said J. P. and M. his wife, F. and G. do hereby severally and respectively acknowledge, and of and from the same sums respectively, and every part thereof, do, and each and every of them doth hereby acquit, release, and for ever discharge the said and respectively, and their respective heirs, executors, administrators, and assigns, and every of them.

When the Consideration is as to Part
secured by Bond.

That in consideration that the said bond of the said R. A. C. bearing even date with these presents, hath been given and entered into to

the said E. F. as aforesaid, for securing the principal sum of £ and interest, and also in consideration of the sum of £ of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said F. N. well and truly paid by the said R. A. C. immediately before the execution of these presents; and making together with the said principal sum of £ so secured by the bond of the said R. A. C. as aforesaid, the sum of £ being the full consideration agreed to be given by the said R. A. C. for the purchase of the said messuage, &c. and all the estate and interest of the said F. N. therein, discharged from any lien or claim at law or in equity, by reason that part of the said consideration is secured by the said bond of the said R. A. C. to the said E. F. and not paid: The receipt of which said sum of £ she the said E. F. doth hereby acknowledge, and of and from the same sum and every part thereof doth hereby acquit, release, and for ever discharge the said R. A. C., his heirs, executors, administrators, and assigns, and every of them.

Another Form.

That in consideration of the said sum of 320 l. paid by the said C. J. to Messrs. S. D.

and S. in part of the said sum or purchase money of 1,600*l.* and paid by them to the said I. S. and I. B. with such consent and approbation as aforesaid; And also in consideration of the further sum of 1,280*l.* of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, residue of the said sum of 1,600*l.* to the said I. S. and I. B. well and truly paid by the said C. J. immediately before the execution of these presents, with the privity, consent, and approbation of the said C. C. and which said several sums of 320*l.* and 1,280*l.* making together the said sum of 1,600*l.* have been paid to, and are received by the said I. S. and I. B. in part satisfaction and part discharge of the principal money and interest now due and owing to them on the mortgage or security made to them and the said R. M. and F. C. as aforesaid, and as to them, and also the said C. C. are in full for the absolute purchase of the messuage, &c. hereby released and covenanted to be surrendered or otherwise assured or intended so to be; the receipt of which said sums of 320*l.* and 1,280*l.* making together the said sum of 1,600*l.* they the said I. S., I. B., and C. C. do hereby severally acknowledge, and of and from the same sum and every part thereof, do hereby acquit, release, and for ever discharge the said C. J. his heirs, executors, administrators and assigns, and every of them.

Another Form.

That in consideration of the premises, and for and in consideration that the sum of 3,620l. of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, is to be paid to the said T. M. and S. D. S. immediately after the sealing and delivery of these presents by the said Accountant General of the said Court of Chancery, by his cheque or note on the Governor and Company of the Bank of England, being the said sum of 3,620l. raised in such manner as is hereinbefore mentioned or recited, pursuant to the direction of the said order of the 11th day of July last; the receipt of which said sum of 3,620l. the said T. M. and S. D. S. are to acknowledge by a memorandum to be indorsed on these presents; and of and from the same sum when paid, and every part thereof, they the said T. M. and S. D. S. do and each of them doth declare, that the said Accountant General of the said Court of Chancery, and also the said Lord R. his heirs, executors, administrators, and assigns, and every of them, shall be acquitted, exonerated and discharged for ever by these presents; the same sum of being in full for the absolute purchase of the inheritance of the fee-simple in possession of the said hereditaments and premises hereinafter described, and intended to be hereby granted and released.

Another Form.

And in consideration of the sum of £ of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said well and truly paid by the said immediately before the execution of these presents, on the nomination and at the instance and request of the said testified by his executing these presents, and in part of the principal monies and interest now due and owing to the said on the security of the several mortgages made to him as aforesaid, and in full for the absolute purchase of the fee-simple and inheritance of the said freehold and copyhold lands and hereditaments hereinafter described, and hereby released, and covenanted to be surrendered or otherwise assured, or intended so to be, discharged of and from the payment of all or any part of the residue of the same principal money and interest, or any contribution on account thereof; the receipt of which said sum of £ the said doth hereby acknowledge, and of and from the same and every part thereof, doth hereby acquit, release, and for ever discharge the said his heirs, executors, administrators and assigns, and every of them.

And these forms vary with the circum-

stances to a degree which will be as infinite as the transactions of mankind admit—and often the motives to settle, to bar intails, &c. &c. are expressed as the consideration.

Formerly the practice was for each person to give a separate and distinct acknowledgment for the consideration paid to him respectively.

In modern practice, it is more usual for the several persons to whom distinct sums of money are paid, to acknowledge the receipt of the sums paid to them respectively by one and the same clause, as shewn in one of the forms already given.

The acknowledgment of the receipt is merely a formal and not an essential part of a deed. Little or no advantage is derived from it. The only real use of it is to enable the releasee to plead the receipt, and the super-added release in bar to any action for the consideration money (a).

To the receipt in the body of the deed is usually added, a receipt to be indorsed on the deed. This receipt is more necessary and useful than the acknowledgment in the body of the deed, since this receipt is regarded by courts of equity; insomuch that when the receipt is signed, it is not incumbent on a future purchaser, unless circum-

(a) *Thurle v. Madison*, Styles, 462.

stances, as notice, &c. &c. impose on him the duty of further investigation, to inquire whether in fact the purchase money has been paid. On the other hand, the want of this receipt is implied notice that the purchase money remains unpaid, and that the lands remain charged in equity with the payment of the consideration.

In deeds of modern date, therefore, care should be taken that the receipt for the consideration money is indorsed and signed, or that distinct evidence can be given of the payment of the purchase money.

The want of this receipt on deeds of ancient date, is not so material; especially if the possession has gone with the deeds: From the length of time the payment of the consideration money will be presumed.

Also when it is stated in the recital of deeds, that the *consideration has been paid* at a former period, and the conveyance is in consideration of payment having been so made, it is neither usual or formal, to add a receipt by indorsement. The receipt as acknowledged in the body of the deed, or the recital, which is evidence of such receipt, has all the effect *in equity*, which would be ascribed to a receipt by indorsement. The reason which introduced the practice of indorsing the receipt, does not apply to a case attended with these circumstances.

It is well known that deeds are frequently executed before the purchase money has been paid; and in equity, the payment of the money might be enforced, although the receipt of it be acknowledged in the body of the deed, when in fact the payment was never made. This rule of courts of equity introduced the general practice of indorsing the receipt on the deed; and the omission to indorse the receipt, and consequent departure from general practice, is deemed by a court of equity, implied notice that the purchase money has not been paid. It is, however, merely implied notice: payment may, therefore, be proved, although there be no receipt for the money indorsed on the deed. Such evidence will be an answer to the presumption raised in favour of the seller from the omission to take the receipt: and although a receipt should be signed, yet the purchaser and the land he has purchased while it remains in his hands will be liable in equity till the money has been paid. Unless it can be made out as a fact that the lien was not to subsist, equity will affect a future purchaser, who takes with notice that the purchase money remains unpaid (a). The difference between the two cases is, when there is a receipt indorsed on the deed, future purchasers may rely on

(a) *Mauroth v. Symonds*, 15 Ves. 399.

such receipt, unless they can be affected with notice, that the seller retains an equitable lien; but when the deed is expressed to be in consideration of a sum of money paid at the time of the execution, and no receipt is indorsed on the deed, or a receipt is indorsed and not signed: this omission, as it affords ground for a suspicion, so it raises the presumption, that the seller retains his equitable lien. This omission of a form observed in general practice, is, in the view of a court of equity, that species of notice which will impose on the purchaser the obligation of taking care that the purchase money has been or shall be paid. For this reason, also, it is usual in abstracts to state at the foot of the abstract of each deed, that a receipt is indorsed, &c. and by whom it is signed.

A very common method also of expressing the consideration when paid to several parties, used to be to insert the consideration paid to each person immediately before the words of grant proceeding from that person: so that the consideration was expressed in different clauses, severed by interposed words of grant: thus—"The said
" in consideration of hath, &c. and
" the said in consideration of hath,
" &c." or thus: "in consideration of
" the said hath, &c. and in consideration
" of the said hath, &c."

In modern practice, except in very par-

ticular cases, it is usual to express the consideration in clauses immediately succeeding each other, so as to make the different clauses of grant follow each other without any interruption from interposed clauses respecting the consideration.

Forms are given in the examples which are exhibited.

It is immaterial in point of effect, whether the one form or the other form be adopted: the present practice has the advantage of rendering the deed more formal, and its objects and effect more simple and obvious.

Besides, a deed so prepared, is best adapted to its recital in future deeds, and to the detail of the title, when it shall be introduced into an abstract. These considerations are always deserving of attention to those who aim at utility, and who, in preparing deeds, look to the future rather than the present.

In the testatum clause, the releasor ought to be named as the releasor; and the words of grant ought to be inserted. If the release be made at the instance, or under the direction of any person, beneficially interested, such direction, &c. should also be expressed.

But although there be an omission of the name of the releasor, yet if, from the context of the deed, it be manifest in point of intention who is the releasor, the omission of his

name will not vitiate the deed. Therefore, where a deed was made between *A.* and *B.* and it was witnessed that in consideration of, &c. did grant, &c. to *B.* &c. Though the name of *A.* as grantor was omitted, and there was no blank for his name, the court supplied the omission.

And as the court, in order to support the deed, has supplied the name of the grantor, so it has rejected the name of a person expressed by mistake to be the grantee.

Thus, in *Spyve* against *Topham* (*b*), there were indentures of lease and release, bearing date the 23d and 24th days of March, 1781, the release being of three parts, between *R. Thickston*, of the first part, *J. Topham*, druggist, of the second part, and *G. Bass*, described as a person named in trust for the said *James Topham*, of the third part; and in consideration of seven hundred pounds to the said *Thickston* paid by the said *Topham*, and of ten shillings to the said *Thickston* mentioned to be paid by *Bass*, he the said *Thickston*, did at the request, and by the direction and appointment of the said *Topham*, testified as therein mentioned, grant, bargain, sell, release and confirm unto the said *James Topham* in his actual possession, &c. and to his heirs and assigns for ever, two messuages, &c. To have

(*b*) 3 East, 115.

and to hold the same unto the said *Bass*, his heirs and assigns: To the use of such person or persons, and for such estate or estates, and in such manner as he the said *Topham*, during his life, should by any deed appoint, and for want thereof, To the use of the said *Topham* and *Bass*, and the heirs and assigns of the said *Topham* for ever; the estate of the said *Bass* being in trust for the said *Topham*, his heirs and assigns for ever. The lease for a year was made between the said *Thickston*, of the one part, and the said *Bass*, of the other part; and thereby the said *Thickston*, in consideration of five shillings to him paid by the said *Bass*, did bargain and sell to the said *Bass*, his executors, administrators, and assigns, all the said premises, to hold the same to the said *Bass*, his executors, &c. from the day next before the day of the date thereof, for the term of one year at a pepper-corn rent; to the intent, that by virtue thereof, and of the statute for transferring uses into possession, he the said *Bass* might be in actual possession of the premises, and be thereby enabled to take a grant and release of the reversion and inheritance thereof, to him and his heirs; to and upon such uses, &c. as should be declared by the said indenture of release.

It was admitted, that the only objection to the defendant's title was in the insertion

of the name of *J. Topham*, as releasee, instead of *G. Bass*, in the indenture of 24th March, 1781. The question for the court was, whether the defendant could make a good title to a purchaser? if he could, a verdict to be entered for the defendant; if not, the verdict for the plaintiff to stand.

The case cited for the plaintiff was *Cro. Eliz.* 903, 4; and the cases cited for the defendant were, *Co. Litt.* 7. a. *Shep. Touch.* 75. *Butler v. Elton*, *Cary's Rep. in Cha.* 122, and *Erles v. Lambert*, *Alleyn*, 41, to shew that a grant is good, although the name of the grantee be omitted in the premises of the deed, provided it be mentioned in the habendum.

Lord Ellenborough, Ch. J. gave the judgment of the court; declaring the cases cited were perfectly satisfactory in authorizing the court to put a construction on the deed, in support of it, which from the reason and good sense of the thing, the court would probably have done, without such authorities.

In *Trethewy v. Ellesdon* (c), the indenture was made the 20th day of September, &c. between *Nicholas Cossen*, &c. of the one part, and *Elizabeth Cossen*, &c. and *Nicholas Cossen*, the younger, son of the said *Elizabeth*, of the other part; and it witnessed,

(c) 2 Ventris, 141.

that whereas the said *Elizabeth Cossen* had given and surrendered into the hands of the said *Nicholas Cossen*, one indenture of lease of an annuity, dated the 15th March, 1657, of ten pounds yearly, going out of all that his barten and demesne called Mulden, for a term yet to come, as in and by the said indenture of lease more fully and at large appeareth, *hath* given, granted, and confirmed, and in and by these presents, doth give, grant, and confirm unto the said *Elizabeth Cossen*, her heirs and assigns, by these presents, one annuity, &c. to have, receive, and take yearly the said annuity to the said *Elizabeth Cossen* and *Nicholas Cossen*, the younger, and the survivor and survivors of them at the usual feasts, &c.

And it was argued for the plaintiff, that there was no sufficient grant by this indenture; for it is said to be made between *Nicholas* of the one part, and *Elizabeth* and *Nicholas Cossen*, junior, of the other part, and then recited the surrender of a former grant; after which came these words, "hath given and granted, and by these presents doth give and grant, &c." and no grantor named.

But the court were of opinion as to the matter, that it was a good grant, the indenture being between *Nicholas Cossen*, of the one part, and *Elizabeth* of the other part;

and then after a recital saith, "hath given
"and granted to *Elizabeth*, &c." that must
be taken that *Nicholas Cossen* hath given
and granted.

The usual words of grant in this assurance are as to trustees, "bargain, sell, and
"release," and as to persons beneficially interested as owners, "grant, bargain, sell,
"release, and confirm."

The formal and more efficient words are
"release and confirm." Either of these expressions will be effectual for the object to be attained: even if both these words should be omitted, either of the other words would, it is apprehended, enable the grantee, being the owner of a particular estate capable of enlargement, to plead the deed as a release.

When the grant is made at the request or under the direction, &c. of any person, the request, &c. are generally introduced in this form:—

"The said at the instance and request, and by the direction and appointment of the said *A. B.* and with the privacy, consent, and approbation of the said *C. D.* testified by their respectively executing these presents, hath granted, &c. and by these presents, doth, &c."

Formerly, it was usual to repeat this clause after the words of grant in the past and also in the present tense.

But by adding the words of direction, &c. immediately before the words of grant in the past tense, the language of direction, &c. equally governs the words in the present tense.

This is then the more neat, and now the more usual mode of introducing the clause of direction, &c. It avoids a repetition, which is always ungraceful to those who read legal instruments.

When there are several grantors, the clause of grant is, in more correct practice, introduced by words of joint and several grant, viz. the said *A. B. C. D. and E. F.* have, and each and every of them hath granted, &c. and by these presents do, and each and every of them doth, &c. And frequently different grantors are arranged in classes, so as to shew the different circumstances under which, and the different characters in which, the grantors act. A complex form is added, as best illustrating the utility and even the object of this arrangement. In exercising powers given to *several* persons jointly, no words of severance, as in the case of a joint and several grant, are used.

In this clause also, the releasee ought to be named. This is proper, though not absolutely necessary. It was formerly the opinion, that though a grant might be good without an habendum, an habendum could not be good without a grant. As far

as respects the grantee, the law to be collected from *Spyoe v. Topham* (d), and the cases there cited, is, that though the grantee be not named in this part of the deed, or though some other person be named by mistake, yet the grant will be good, if from the context, and in particular the habendum, &c. the intended grantee can be ascertained beyond all reasonable doubt; and if the grant be to several, and some of them only are capable of taking, the grant will be good to those alone who are capable.

It is also usual to express in this clause the words of limitation when an estate in fee is to be conveyed. This is only a formal part of the deed, nor is it necessary when there is an habendum, since the habendum is in point of law the proper part of the assurance for introducing the words of limitation. It is the office of the premises to name the grantee, and describe the parcels, and of the habendum to limit the estate.

But it may be observed, that if the habendum be inconsistent with the grant in the premises, the grant in the premises will prevail, and the habendum be rejected (e).

(d) 3 East. 115.

98. *Auditor King's Case*,

(e) Sheppard's Touchstone, cited 8 Rep. 56.

Therefore, if a grant be made to *A.*, and his *heirs*; habendum to him for *his life*, or to him and his executors for years; the grant will prevail, and the habendum be rejected.

Whenever the grant in the premises can be rendered consistent with the limitations in the habendum, the words in the grant will be qualified by the words in the habendum (*f*). The rule is, that where a deed speaks by general words, and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words (*g*).

Thus if a grant be to *A.* and his heirs, habendum to him and the heirs of his body (*h*), or habendum to him and his heirs, during the life of some other person or several persons: in the former case only an estate tail, and in the latter case, only an estate for life or lives will pass, because in both these instances, the word "heirs," in the habendum, is rendered consistent with the word "heirs" in the grant (*i*).

(*f*) 8 Rep. 154, b.

(*g*) 7 Edw. 3. *Mortimer's*
Case, 8 Rep. 154, b.

(*h*) Co. Litt. 21. 8 Co. 154.
Moor, 87. Cro. Jac. 476.

(*i*) Grant to two, habendum
to one for life, remainder to
another. Shep. Touch. 109.

Co. Litt. 183.

And when the grant and the habendum import the gift of different estates, as a grant to *B.*, and the heirs of his body, habendum to him and his heirs, an estate in tail will pass by the grant in the premises, and the remainder in fee will pass by the habendum (*k*).

It would have been the reverse if the grant had been to *A.* and his heirs, habendum to him and the heirs of his body, for the habendum would have qualified the grant.

So the habendum may destroy the effect of the grant, and render void a deed which without the habendum, would have been good: as when a grant is made to *A.* for his life, or to *A.* and his heirs, without any habendum (*l*), the grant may operate according to the intention of the parties; but by the addition of an habendum. To hold from *a day to come*, or from *an event*, thus importing to pass an estate of freehold under the rules of the common law, and to commence in future, which is contrary to the rules of that law, the habendum will destroy the effect of the grant, and the deed cannot operate either

(*k*) 2 Co. 55. Hob. 171. (*l*) Co. Litt. 21, a. 8 Rep. Cro. Eliz. 254. 9 Co. 476. 154, a. Shep. Touch. 108, 3 Lev. 339.

under the grant, or under the habendum (*m*). Also the habendum may regulate and modify the language of the grant, as in the instance of a grant to two, habendum to one for life, remainder to another in tail or in fee; and in the instance of a grant to two persons of lands, habendum, one moiety to one in fee, and the other moiety to the other in fee.

As it is the proper office of the premises of a deed to name the grantee, and of the habendum to limit the estate, it is highly expedient to observe this regulation, so as to introduce the limitation of estate into the habendum without attempting to express the estate in the premises. General convenience enforces this regulation. It facilitates practice; it aids the judgment; it assists the memory; it enables men of experience to perform their duty with dispatch and with judgment. And each of these considerations is of importance to the public as well as the individual practitioner.

3dly, The lease for a year is generally recited in this part of the release. Sometimes, though not very frequently, it is re-

(*m*) *Baldwin's Case*, 2 Rep. 23. 55. 1st resolution. *Hogg v. Shep. Touch.* 169. 1 Inst. 183. *Cross, Cro. Eliz.* 254.
 (*n*) *Buckler's Case*, 2 Rep.

cited after the clause, "All the reversion." It is immaterial in what part of the deed this recital is introduced. But as it is more generally expected to find this clause in this part of the assurance, there is, with a view to practice and professional habits, a convenience in having it inserted in this part of the deed.

It is observable also, that the recital is only a formal and not an essential part of the release; for if, in point of fact, there be a lease, it is of no consequence that the recital is omitted. The object of the recital is to make it evidence of the lease as against the releasor, and those who claim under him.

In practice it is doubted by some gentlemen of experience, whether this recital operates by way of evidence or estoppel; and those who think that it operates by way of estoppel, contend, that in recovery deeds, and as against the issue in tail, or the persons in remainder or reversion, the recital cannot be used, since persons of this description claim under the original donor, and are not bound by estoppel. But considering the recital as evidence only, and not as estoppel, there does not seem to be any well founded reason against the admission of this evidence, in a question in which the issue are concerned, or, as in the case of recovery deeds,

the reversioners or remainder-men are interested. There is an incongruity in admitting that the release is operative at the time of suffering the recovery, and inoperative at a future day, under the same identical evidence.

In *Ford v. Lord Grey* (e), it was resolved that the recital of a lease in a deed of release, is good evidence of a lease against the lessor, and those that claim under him. In *Salkeld*, there is a report of the same case (p). There is the qualification, that as to others it is not evidence, without proving that there was such a deed, and that it has been lost or destroyed.

The cases on this point with their distinctions will be found in Com. Dig. Evid. B. 5.

By an act of parliament in Ireland, a recital of a lease for a year is conclusive evidence of such lease, and no lease is prepared. In some of the West India islands also, and particularly in Jamaica, no lease for a year is used.

When a recital of a lease for a year is introduced, it should be in this form ;

*In the actual possession of the said
now being, in virtue of a bargain and sale
thereof made to him by the said
in consideration of five shillings, paid to*

(e) 6 Mod. 44.

(p) 1 Salk. 285.

each of them by the said . . . , by indenture, bearing date on the day next before the day of the date, and executed before the execution of these presents for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession.

Or it should be with such variations, as the circumstances of the case may require. It should express by whom and to whom the bargain and sale is made, and on what consideration; and that by force of the statute of uses the grantee is in the actual possession.

The expression, however, that the grantee is in the actual possession, is not strictly correct. The bargain and sale gives the estate only, not the possession. Any language which shows that the grantee has a vested estate for one year, will be more correct; but an attempt to change the present form, would meet with opposition, and would not be productive of any benefit, except under the rule, *qui bene distinguet bene docit*.

Let it also be observed, that when a conveyance is made by a corporation by lease and release, and the lease is perfected, as in prudence it ought to be by entry, the re-

cital in the release of the lease for a year should advert to and notice the entry, instead of referring, as is usual in ordinary cases, to the statute of uses. The declaration also at the end of the lease for a year, instead of being in the common form, should state that the demise is made to the intent that by virtue of these presents, and *an entry* to be made by force of the grant or demise hereby made, the said (the grantee) may be in actual possession, &c. (p).

4thly, Of the Parcels.

No part of a deed requires more attention than that which contains the parcels.

In all cases care should be taken that all the lands intended to pass, are included; and that no lands are included except those intended to pass; and the lease and release should severally contain, either in words or in substance, precisely the same parcels: general or comprehensive terms, should receive minute attention, to guard against mistakes in this particular.

(p) *Buckler's case*, 2 Rep. 55. 1st Resolution. *Hogg v. Cross*, Cro. Eliz. 254.

At law no more will pass than is well described; and all that is described, and that the grantor is competent to convey, will pass.

As between a seller and his heirs, and a purchaser and his heirs, a court of equity will correct any error, by supplying the omission of any parcels by mistake, or decreeing a reconveyance of parcels included in the conveyance, but not intended to pass.

But (q) the issue in tail, or persons in remainder, are not bound to supply any omission. This is, often, relevant and material, in regard to the effect of recovery deeds.

In general, it is right to adopt the description contained in the former deeds, unless on account of a division of an *entire thing*, as a manor or farm, into parcels, such description would be irrelevant. When such subdivision takes place, the new description should be made as simple as may be, and the attention should be directed to select those circumstances of description which will distinguish the property from any other.

After enumerating the parcels by their denomination, as a manor, farm, &c.

(q) In a conveyance by tenant in tail.

the leading circumstances of description are numbers, quantities, name, local situation, as to township, parish, &c. occupation, rent, abuttals, or boundaries, or the like; and in case any words are used in reference to a former description, these words should make the reference as clearly and distinctly, and at the same time as simply as may be. Complexity and accumulation of description should be studiously avoided.

In general, descriptions which depend on words of reference involve too much language, and accumulate description on description, until they have rendered the description so complex, as to be hardly intelligible: at all events, to be intelligible only by a great exertion of the mind, and a minute comparison between the words of reference and the different circumstances, facts, &c. brought within the compass of the terms of reference; and frequently an error in any one branch of the description will destroy the effect of the grant, since the description cannot be made out by evidence.

When a new description is adopted, it is prudent to take the most obvious circumstances of certainty, as the foundation and ground-work of the description: thus
“ All that messuage, tenement, and farm,

“called , situate in the parish of ,
 “in the county of : which said heredi-
 “taments do consist, &c. or do contain,
 “&c. and were formerly the inheritance,
 “&c. or were late in the occupation, &c.”

The advantage of adopting this mode is, that the subsequent part of the description is independent of the former part of it, and therefore, though the subsequent circumstances of description may be erroneous, this error will not vitiate the grant, since that which is certain of itself, cannot be destroyed by that which is uncertain, false, or insensible. And it is a general rule, that when the first and material circumstances of the description are true, a false addition does not affect the validity of the grant(r). The maxims are, *falsa demonstratio non nocet: nil facit error, nominis cum de persona [or de re] constat. Veritas nominis tollit errorem demonstrationis.*

When circumstances of demonstration are added to a description which is certain, the sole object is to distinguish the particular lands from others, to which the description might otherwise apply; or to express the intention of the parties respecting the quantities, &c. or to give a history

(r) Bacon's Maxims, No. 13. And see *Doe v. Greathead* and 25. Shep. Touch. 246. 8 East, 91.

of the deduction of the title from owner to owner; or to connect the title under the deed in preparation, with the title under former conveyances, wills, &c.

In general, purchasers are very anxious to have a new description of the parcels they purchase, so as to adapt the description to the present circumstances of the property.

This is done in one of two modes, either,
 1st, By describing the parcels by their old description, and then adding a declaration to this effect, "Which said messuages, &c. are now better known or distinguished by the several names, quantities, and other certainties herein-after mentioned, that is to say, All, &c." or, 2dly, The modern description is first inserted, and this is the more correct form: and then a declaration to this effect is added, "Which said are the same as were comprised in certain indentures, &c. and were there described as, &c." [here insert the old description.]

But this object is frequently more concisely and more neatly attained, by the mode of referring to the parcels in the recitals of former conveyances: for instance, a recital that by indentures of lease and release, bearing date, &c. and made, &c. all, &c. either taking the parcels fully, with the

additional clause, "which said messuages, &c. are the same messuages, &c. as are hereinafter described, and hereby released, &c." or which is still preferable, "divers messuages, &c. therein particularly mentioned and described, being the same messuages, &c. as are hereinafter described, and hereby released, &c. or [as the circumstances require] comprising among them the messuages, &c. hereinafter described, &c."

In modern practice, schedules for the description of parcels are made, as will afterwards be noticed, the means of simplifying the form and the language of deeds.

The general rule is, that there must be a sufficient certainty of the lands conveyed; and if there be an uncertainty respecting the parcels, the deed will, as to these parcels, and so far as the uncertainty exists, be void.

The rule of law, however, is, that "*certum est quod certum reddi potest.*" For this reason it is immaterial whether this certainty be in the deed as a substantive or independent description, or depends on a reference to some other deeds, or to facts or other circumstances: and the description may be by a reference to a description contained in other deeds, as "all those messuages, &c. which were comprised in certain indentures, bearing date, &c. and

“thereby conveyed, &c. to and to the use
“of, &c.”

But this is an inconvenient and objectionable mode of description, since, in order to give application to the language of the deed, and the certainty of the parcels, the deeds themselves to which the reference is made, must be produced and proved; at least in the cases of titles depending on modern deeds.

In the case of a reference to ancient deeds, perhaps evidence that the lands have been held under the deeds to which the reference is made, would be received, without proving, or even producing the ancient deeds: and the objection does not exist when the deeds containing the reference are indorsed on the deeds containing the description to which reference is made.

The objection also is in a great measure, if not wholly obviated, in most instances, by a previous recital, which contains a description of the parcels, and thus as between the parties contains a positive certainty, except so far as the issue in tail, or persons in remainder, may be affected by the question. On this point the observation applied to the recital of a lease for a year, in the release, will be equally relevant to any other recital. The observation of Lord Chief Justice Holt, applicable to this point, and it embraces a general rule, is;

"a general recital is not an estoppel, but
"the recital of a particular fact is (s)."

Nor is the objection of so much force
when the description refers to a *fact* capa-
ble of proof, as a descent, seisin, occupa-
tion, and the like.

As often as there are various recitals in
a deed, with reference to a deduction of
the title to different parcels, the more sim-
ple, neat, and accurate mode is, to insert
the parcels comprised in each class of
deeds, in a distinct *schedule*, and to make a
reference from time to time in the recital,
and also in the grant to the appropriate
schedule: thus the recital will be to this
effect: "Whereas by indentures, &c. bear-
"ing date, &c. and made, &c. all, &c. which
"are comprised and described in the first
"schedule to these presents, with their
"rights, members, and appurtenances, were
"assured, &c." Or, when the circumstances
require it, the recital will assume this
form: "Whereas, by indentures, &c. bear-
"ing date, &c. and made, &c. *divers here-*
"*ditaments*, and among them, all those, &c.
"comprised in the first schedule to these
"presents, were assured." And then the
schedule will omit all the parcels in the
recited deeds, except those which are the

(s) 1 Shower, 57. *Salter v. Kidley*, cited 1 Saund. .8. Holt.
210. 1 Inst. 52.

subject of the deed under preparation. The other recitals will proceed in like manner, adapting the recital to the circumstances.

The grant will be by *words* of reference to the description in the schedules, and will be governed by the intention of the parties. In general, it will be to this effect: "All those, the messuages, &c. which are mentioned and described in the first, second, and third schedules, in these presents, and every part, &c."

In case the general words proper for the parcels in each schedule, are added in that schedule, then the reference will be to the rights, members, and appurtenances, by general words thus: after the words "every part and parcel of the same," adding, "with the rights, members, and appurtenances;" but when, as more frequently happens, the general words are not inserted in the schedule, the general words should be introduced into the body of the deed, in the same manner and in the same form; as if the description of the parcels had been inserted in the body of the deed, in the clause containing the grant.

While adverting to this subject, it will be proper also to notice, that sometimes the ancient description, and sometimes the modern description, is for convenience thrown into a schedule, instead of being contained in the body of the deed. Simplicity, and a desire to keep the deed in a state to

be intelligible, with greater ease, are the objects in view; and no persons, except those who have had experience on this subject, can fully appreciate the practical convenience of these and the like arrangements. One caution, however, which is rarely observed, is deserving of notice in this place: whenever there is one description dependent on another, or connected with it, care must be taken to guard against any omission which may be found in the effective description; and with that view, there should be added some words of reference to embrace the lands contained in the modern, or in the ancient description to which reference is made, either for identity, or for greater certainty: for instance, supposing the conveyance to be of "all those lands heretofore described, as . . . ;" with a reference to them, as "now better known or distinguished by the names of . . . ;" or the grant is of "all those . . . now called . . . ; which said . . . , were formerly described as . . . or were formerly known by the names, &c. contained in the schedules;" in each of these instances there should be ulterior words of description, for the purpose of comprehending, as the case may require, any parcels contained in the ancient or the modern descriptions, which may not have been effectually comprised by the efficient part

of the description. Such additional clause may be in these terms, or to this effect: "And all other the messuages, &c, which are comprised or described in the schedules to these presents, and not hereinbefore released or otherwise assured;" or, "All other the messuages, &c. comprised in the description, lastly hereinbefore contained, and not hereinbefore released or otherwise assured." The necessity, or at least the expediency of such additional clause of description, arises from the consideration, that an additional description referred to for the purposes merely of certainty or of identity, cannot give to the terms of description any effect beyond their own genuine import; consequently the circumstances of identity or description cannot be made to comprehend lands which are clearly and beyond all doubt omitted.

For example, suppose three farms are intended to be conveyed, and they are called *A.*, *B.*, and *C.*, and were formerly described as *D.*, *E.*, and *F.*; and the grant is of all those farms called *A.* and *B.*, and the reference is, by these, or the like terms, "which said farms were formerly called, *D.*, *E.*, and *F.*" It is obvious, that this demonstration or addition is false; and it is apprehended that the false demonstration or addition cannot extend the words

of description in the grant beyond their actual import, since it is as probable that the farm *C.* may have been omitted out of the grant by design, as that the farm *F.* may have been inserted in the enumeration of the circumstances of demonstration with an intention to include it.

In assignments of leaseholds the prevailing practice is to introduce the parcels in the recital of the lease; but in conveyances of the inheritance, it is always desirable, when the circumstances will admit of that arrangement, to introduce the description of the parcels into the operative part of the deed.

But even in conveyances in fee, particularly in re-conveyances by trustees or mortgagees, it is common to insert the parcels in the recital, and to convey them by words of reference to the description in the recital.

Trustees and mortgagees frequently object, under the advice of cautious practitioners, to convey by any other description than the identical description contained in the deeds of conveyance to them, or those under whom they claim. In such cases, it is advisable to add to that description, words to comprise lands, &c. which have become subject to the same uses since the creation of the trust or mortgage; thus, "All messuages, &c. which by exchange,

“allotment, or otherwise, are subject at law or in equity to the uses or estates affecting the messuages, &c. hereinbefore described, or any of them.”

The observations peculiarly proper to the description of parcels in recovery deeds, will be found in the chapter on Recoveries.

When freehold and copyhold lands are intermixed, care must be taken not to include the copyhold lands in the operative part of the grant: or if they are included by general words, as parcel of a farm or close, &c. they should be expressly excepted.

In many instances, experience proves it to be impossible to distinguish the freehold from the copyhold lands, and it may happen that some of the lands to be particularly described are of copyhold tenure, so that the exception of them would be inconsistent with the grant, and for that reason the exception be void.

To obviate this difficulty, the grant itself should be of “All such and so many and such parts as are of freehold and not of copyhold, or customary tenure, of and in all, &c.” adding a full description of all the parcels, including freehold and copyhold lands, or inserting such parcels in a schedule.

Sometimes the parcels are so circumstanced, particularly in cities and towns, and

in common field lands, that it is almost impossible to describe them accurately; or if they could be accurately described, the description would run into a great and inconvenient length.

In cases of this sort, a map or plan may with great convenience and propriety, be used or referred to as part of the description of the parcels.

In that case, the reference to the map or plan may be made by a clause to this effect: "which said hereditaments are more particularly delineated or described in the map or plan thereof, written in the margin or [according to the fact] contained in the schedule to these presents," or "in the schedule hereunder written, or heretunto annexed." In this instance also, there should be general words to comprehend all the parcels in the map, so as to embrace those parcels, if any, which may have been omitted out of the description in the grant.

Sometimes, and particularly in titles depending on terms for years, it is impossible from the confusion of boundaries, or otherwise, to show to what parcels the description in the ancient deeds is applicable. As often as this difficulty occurs, different modes of practice are observed.

Sometimes the deed creating the lease recites the parcels fully, as in the lease; and

the parcels which are sold, and are to be assigned, are described either in the recital of the purchase deeds, or some other recital, or stated in a schedule, and the assignment will be made of "all such and so many" and such part of the hereditaments comprised in the said indentures of, &c. and thereby demised, &c. as are comprised in the said hereinbefore recited indentures," or according to the circumstances "in the schedule hereunder written, or hereunto annexed;" or some other terms of reference adapted to the circumstances of the cases should be used.

At other times the parcels to be conveyed are described fully in the operative part of the deed; and words of qualification to this effect are added: "or such and so many and such parts, &c. of the said messuages, &c. as are comprised in the said term, and became vested in the said, &c." either by the means aforesaid, or any other means.

For a variety of forms of this sort see the precedents to be introduced into the next volume.

In deeds of partition and settlement it is usual to have a general description in the operative part of the deeds, and a more detailed and minute description in the declaration of uses. This becomes necessary when by reason of a new arrangement of

the parcels into farms, &c. the old description is inapplicable to the allotments.

A preferable mode seems to be to allot the lands, and describe the lands in each allotment fully in a separate schedule, and to convey all the lands comprised in the schedules; and then to declare the use of the lands in the different schedules, according to the agreement of the parties; by appropriate references to those schedules.

When exchanges have taken place either under acts of parliament or under other authorities, it is common to grant the parcels by their old description, and to add an exception of all the lands which have been taken from the grantor under the allotments, and to grant by general words, or a particular description, all the lands which have been *allotted to him*.

To the particular description should be added the general words of "all messuages, "&c." or "all houses, &c." or "all ways, "&c." adapted to the particular parcels.

And when the words of description used in the deed under preparation embrace, under a collective name, or general denomination, more lands than are intended to pass, there should be an exception of such of the lands, &c. as are not intended to be conveyed. This exception should be made by the words "excepting out of the grant, &c." hereby made, or some other words to that

effect. An exception is particularly important when there is a grant of a manor, and some of the demesnes are to remain the property of the grantor, or are to be conveyed to other persons.

The rules respecting the exception (a) are, 1st. It must be to the grantor, &c. at least not to a stranger. But it is not necessary to name any person.

2dly. It must be of part of the thing granted, or of an easement, as a way, &c. and not of a thing not comprised in the grant, nor of a thing not *in esse* (b).

3dly. It must be of a *particular thing* out of property comprised under *general words*, or under a general denomination: as a farm out of a manor; a close out of a farm; a room out of house; or the like.

For the exception of a particular thing granted by a particular name will be repugnant to the grant, and void for that reason.

4thly. It must be of a thing capable of being severed; and the description of the thing excepted, must be as certain as if it were to be granted (c).

After the description of the parcels, the clause of "all the reversion, &c." is generally added.

(a) Co. Litt. 47, a. 1 Shep. Touchstone, -76. tion and reservation, Co. Litt. 47.

(c) *Wilson v. Armourer*, Sir

T. Raymond, 207.

This is a formal and not a necessary clause. By a grant of lands the reversion or remainder of those lands will pass (*d*); but lands in possession will not pass by a grant of the reversion or remainder (*e*) of these lands; but a reversion will pass by the name of a remainder, or a remainder will pass by the name of a reversion (*f*).

With some gentlemen it is a practice to grant the reversion or remainder, and not the lands themselves, as often as the grantor has the reversion or remainder only. As often as this is done care should be taken that the reversion or remainder is accurately described; any important error in the description would vitiate the grant; for instance, when there is not any such reversion or remainder as that which is mentioned in the grant.

For this reason it is rarely if ever prudent to grant the reversion or remainder *eo nomine*, as the efficient part of the description.

The particular case in which it is convenient and even proper to grant the reversion or remainder *eo nomine*, is, when the grantor has several estates in the same lands,

(*d*) Plowden, 161. 10 Rep. 107, a. Vaughan, 83.

(*e*) 10 Rep. 107, b. Vaughan, 83.

(*f*) Shep. Touchstone, 84.

and he wishes to grant, as he may do (*g*), one of these estates, being in reversion or remainder, and to retain the other estates. To grant the lands themselves would, under these circumstances, be to grant the possession: however, even when the lands themselves are granted, effect may be given to the intention by a conveyance to uses, and a proper declaration of the uses of the conveyance. But particular care is to be taken to grant the reversion or remainder only, when the learning of merger would apply, and would destroy contingent remainders, contrary to the intention if several estates were granted.

When rents are to be apportioned, on account of the division of the lands out of which the rents are reserved, a clause of apportionment may be introduced in this part of the deed by a grant of a portion of the rent, and this apportionment may be introduced into the grant in these terms:—" And
 " also the yearly sum of , being that
 " part of the yearly rent of reserved
 " by the said indenture of lease, bearing
 " date, &c. which according to an appor-
 " tionment, agreed upon between the said
 " [grantor and grantee] is to be received by
 " the said grantee, his heirs and assigns, as
 " from the day of in respect of

(*g*) Co. Litt. 54, b. 345, a. both estates passed by force of
 In the case put in Co. Litt. 345, the words *totum statum suum*.

“ the messuages, &c. hereby released,
 “ or otherwise assured or intended so to be.”

Also in this part of the deed, the clause of *all the estate* (*h*) is generally added. It never should be added, unless it be the intention of the grantor to pass all the estate vested in him. It should always be omitted when a particular estate only is creating (*i*).

Sometimes, particularly in assignments of leases, this clause has been the operative part of the limitation ; and the habendum, as being repugnant thereto, has been rejected (*k*). But according to the case of the *Earl of Derby*, 8 East, 502, the habendum may limit a particular estate, by way of under lease, notwithstanding the clause of all the estate.

The latter determination very properly construes the different parts of the deed, as amounting to a grant of all the estate, viz. all the ownership, with the qualification introduced by the habendum, viz. during the time of the particular estate to be created ; and thus renders the several parts of the deed consistent.

Another clause usually added in this part of the assurance imports a grant of all the deeds, &c.

(*h*) Co. Litt. 345, s.

(*k*) *Jermyn v. Orchard*, Show.

(*i*) See page 179 of this volume. Par. Cas. 199.

There is scarcely any form which varies more than this does, in the hands of different gentlemen.

The form in the Appendix has been generally approved, and seems to ascertain the rights of the parties as between purchaser and seller, according to the general opinion and practice of the profession.—But in mortgage deeds the grant should be of all the deeds generally, and not of those only which concern the lands jointly with others of less value.

Some gentlemen omit the clause of all deeds, &c. altogether. Agreeable to the present understanding of the Profession concerning the right to deeds, this clause should not be omitted.

According to the case of *Field v. Yea* (l), the deeds will belong to the grantor, if he retain any part of the lands, unless he expressly grants the deeds by words, transferring the property of them to the grantee, so as to enable him to maintain an action of detinue or trover.

For the old learning respecting deeds and the right to them, see *Buckhurst's case* (m). The particular decision in the case of *Field v. Yea*, is not easily reconcileable with those first principles of law, which flow from the

(l) 2 Durn. and East, 708.

(m) 1 Rep. 1.

rules of commutative justice, or with the particular maxim, *quod meum est sine facto sive defectu meo amitti vel in alium transferri non potest*. The decision is tenable only on the ground that the property in the deeds was not fixed, but ambulatory; leaving the property to the law of nature, *qui capis ille facit*.

Of the Habendum.

The habendum consists generally of several parts, viz.

First. An enumeration of the parcels.

Secondly. The name of the grantee.

Thirdly. The limitation of the estate intended to be granted.

Fourthly. Of words of modification or regulation.

First. The parcels are generally enumerated by words of reference. These words of reference should be sufficiently comprehensive to embrace all the parcels; and the general words used in this part of the deed for the purpose of enumerating the parcels, should be used throughout the deed on all occasions in which it may be necessary to refer to the parcels. In strictness, the enumeration of the parcels in the habendum is not necessary in ordinary cases. The only case in which it is necessary, is where diffe-

rent lands included in the parcels are to be granted for different estates, so that it is necessary to distinguish some of the parcels from others, as the forms in the Appendix; and even under these circumstances one habendum may introduce several lands to be held for different estates: thus to have and to hold all, &c. unto the said his heirs and assigns, viz. as to to him, his heirs and assigns for ever, and as to to him and his heirs for the life of

Secondly. The grantee ought to be named in this clause. The law will not admit of the introduction into this clause of a mere stranger as a grantee. A stranger, it is well known, may be introduced to take by way of remainder after the determination of the estate of the grantee, so as a particular estate is limited to the grantee: and although the grant be to several persons, the habendum may either sever their tenancy, or it may limit an estate to one for life or in tail, with remainder to the others, or it may limit one moiety to one and the other moiety to the other. This, however, is more commonly done at this day by a declaration of the uses of the conveyance, rather than by the grant.

Thirdly. It is essential in all cases in which any other estate than for life of the grantee is to pass, that words of appropriate

Limitation should be added to the grant; and they are properly, and when omitted in the former part of the deed necessarily, inserted in this clause. Of course to pass a fee, the word "heirs," and to pass an estate-tail, the words "heirs of the body," with words of procreation, as "to be begotten," or the like equivalent expressions, and with such other additional words as are proper to designate heirs of a particular description, when heirs of that description are intended to take, must be inserted. And when a mere estate of freehold, *pur autre vie*, is to pass, the limitation may be to the heirs or to the executors of the grantor, according to the intention of the parties. Sometimes the limitation has been to the heirs, executors, administrators and assigns. In such case it has been determined, that the heir shall take as special-occupant in preference to the executor (p). But it should seem that all of an estate, *pur autre vie*, would pass by a mere grant to the person, without extending the gift in terms either to the heirs or to the executors or administrators.

In creating an annuity in fee there is the peculiarity that the grantor must grant for

(p) *Atkinson v. Baker*, 4 Durnf. and East, 299.

himself and his heirs (q), to the grantee and his heirs, in order to make the annuity perpetual; for there cannot be an annuity in fee unless the heirs of the grantor are charged by the grant. These observations apply to an annuity in fee as distinguished from a rent-charge in fee.

In limiting estates, *par autre vie*, it is the more eligible way, if circumstances and the intention will admit, to limit the estate to and to the use of the grantee, his heirs, &c. rather than to make the limitation and the declaration of the use in distinct clauses. The like observation is applicable when several persons are grantees, and to be tenants in common. The habendum may at once be to and to the use of the grantees, their heirs, &c. instead of a grant to them as joint-tenants by the rules of the common law, with a clause declaring the use to them as tenants in common.

Observe also, that all estates of freehold granted by a common-law conveyance must, except in the instances of things created *de novo*, be granted to take effect immediately. A grant either of lands or of the reversion of lands, or of rents already created, for an estate to begin from a day to come,

(q) Co. Litt. 144, b. 1 Roll. Abr. 226.

or on an event, and which would place the freehold in abeyance, is void (r).

Fourthly. When there are several grantees, and they are to be tenants in common, then to control the construction of law, upon the grant, words of modification for severing the tenancy must be added:

In common-law conveyances, and consequently in this assurance by release, which is one of them, the words "to hold, &c. as tenants in common," either with or without words negating the joint-tenancy, must be used; but in conveyances to uses, as far as respects the limitation of the use, and in wills, words of modification of less definitive import, as "equally to be divided, &c." will suffice (s).

Under this head it may with propriety be noticed, that a person who has the fee (except it be a fee derived from the conversion of an estate-tail into a base fee,) has the utmost extent of interest of which he is capable: and his estate doth not admit of any increase or enlargement. It may be determinable or defeasible, and these qualities may be discharged by a release. Such release operates by way of extinguishment of right or title, and not a release in enlargement of a prior estate. When an in-

(r) Essay on Est. Chap. 2 Ves. 252. But see Cases and "Freehold." Opinions, Vol. ii. 279. Willes.

(s) *Fisher v. Wigg*, 1 Peere 180, 2 Bro. C. C. 233. 3 T. Will. 14. *Rigden v. Valkier*, Rep. 765.

strument operates as a release by way of enlargement, it *transfers* an estate; it passes a seisin: in short, it is a *conveyance*; and hence the practice that uses may be and are continually declared of a seisin transferred by this assurance; but no use can be declared on a release of right or title, or of a possibility; and of this description is a release of the determinable or defeasible quality of an estate in fee. There is one species of fee, however, which, as already noticed, admits of enlargement. This is the particular case of an estate-tail converted into a base or determinable fee. In this instance, the base or determinable fee may be in one person, and an actual estate may be in another person; and on principle, this fee or particular estate may be enlarged by the accession of the remainder, or reversion in fee, which confers the ulterior interest; for there is an estate to be added, and it is a distinct interest, and that estate is in legal denomination larger than this base or determinable fee; and by the union of the two interests, the ownership under the determinable fee may merge in the absolute fee. This case is an exception to a general rule, that one fee cannot be dependant or expectant on another fee. That rule is universally true, when understood with the qualification, that one fee cannot, by the *grant* of the

party be expectant on another fee. The conversion of an estate-tail into a base fee, is merely a consequence or conclusion of law. The material difference is where a man grants an estate to another and his heirs, determinable in any manner, he retains merely a possibility of reverter. This possibility may be released to the person who has the determinable fee, but it does not admit of being granted: on the other hand, an actual reversion or remainder, though expectant on a base fee, derived from an estate-tail, confers an interest, which may be granted from one person to another; and for that reason may be released to the person who has the prior estate in fee. No doubt is entertained, that even when there is a determinable fee, an instrument in the form of a lease and release would operate by way of release of the possibility. The case is noticed only for the sake of a distinction, and to illustrate the general principles which govern the assurance by lease and release, as a conveyance admitting of uses to be executed into estate, under the statute for transferring uses into possession.

Of the Declaration of Use.

As this species of assurance passes an estate at the common law, it admits of a declaration of use, and the use should al-

ways be framed so as to express the intention of the parties. The uses thus flowing from, and governed by the intention of the parties, vary so materially in every instrument, that it will be more proper to consider the uses to be introduced in each instrument, in treating of that instrument, under the different heads of purchase-deeds, and the like, than to detain the reader with a discussion of the subject in this chapter.

However, the general observations suggesting themselves on the circumstances which render it necessary to resort to a conveyance to uses, because the intention cannot be accomplished by a conveyance at the common law without uses, will form an useful part of this work, and will be introduced into this chapter.

The declaration of uses generally, though not necessarily, follows the habendum. Sometimes there are several clauses of habendum, and there will be one entire declaration of use of the several estates passing by each distinct habendum. Sometimes also the uses are declared distinctly as to different parts of the lands, and frequently the clause declaratory of the use, finds its place in some other part of the deed than the clause immediately following the habendum. Within the whole scope of the learning, more peculiarly belonging to the province of the conveyancer, none is more important to be known than that which concerns the doctrine

of uses : for there are many things which may be done through the medium of a conveyance to uses, which cannot be accomplished by a conveyance merely and simply at the common law ; consequently there are many instances in which it is absolutely necessary to resort to the learning of uses in framing a conveyance.

The following observations will give a general outline of the more useful points arising out of this important learning.

First. No one can take immediately under a grant, unless he be named as the grantee ; and, as a consequence, a child unborn cannot take the first estate limited by the grant ; because he is not capable of being the grantee, or of immediate livery. But a conveyance may be made to one person to the use of another person, and a child unborn may be the first *cestui que use*.

Secondly. A man and his wife are considered in law as the same person, and from the legal unity of their persons, a grant from a man to a woman, being his wife, is void. But a grant by a man to another person to the use of his wife is good : so a devise by a man to his wife is good, since a will does not operate with effect until the death of the testator.

Thirdly. A man cannot at the common law make a grant of an estate of freehold to commence *in futuro* ; but he can con-

vey the land immediately to an use which is to give an estate of freehold to commence *in futuro*.

Fourthly. A man cannot make a grant at the common law, reserving to himself a particular estate, as an estate for years, for life, or in tail; but a conveyance may be made to a man to uses under which he may limit to his own use an estate for years, for life, or in tail; and if he declare some uses, but leaves an interval for the precise period of his life, the use will result to him for that period.

Fifthly. At the common law, a man cannot grant an estate, reserving to himself a power over that estate. All he can do is to annex a condition to defeat that estate, so as to restore himself by the operation of the condition to his own ownership; but a conveyance may be made to uses; and under these uses the former owner may reserve to himself a power of revocation, which in some degree partakes of the nature of a condition; or he may reserve a power of new appointment; and under the latter power he may defeat, either wholly or partially, the use limited in favour of other persons.

Sixthly. On a conveyance at the common law, the estate cannot be defeated by any other means than a condition; and no one except the grantor or his representatives, or in some cases by statute law, the assignee having the reversion after a parti-

cular estate, can take advantage of the condition; but through the medium of a conveyance to uses, powers of revocation and of new appointment may be given, either to the grantor or a stranger; and these powers, when exercised, will defeat the estates previously limited, as far as the estates shall be affected by the revocation or new appointment.

Seventhly. A condition, except when annexed to a lease for years, must defeat the entire estate to which it is annexed; but a power under a conveyance to uses may not only defeat the estate to which it is annexed, but it may abridge or postpone the same, or introduce a particular estate in derogation to the former estate, so as to defeat that estate partially, as in the instances of powers of leasing, jointuring, &c. and appointments in exercise of that power.

Eighthly. No one taking an estate by grant at the common law, can by rightful alienation confer a title for a longer time than the continuance of his own estate; but under uses in a conveyance, the owner of a particular estate may have a power which will enable him to confer the right of enjoyment after the determination of his own estate, as in the common case of estates for life, with powers of leasing, jointuring, &c.

Ninthly. By the rules of the common law, several persons, taking, at *different*

times, on account of their coming *in esse* at different periods, must necessarily take as tenants in common. See *Justice Windham's case*, 5 Coke. But under a conveyance to uses, several *cestuis que use*, taking at several times, because they come *in esse* at different periods, may take as joint-tenants, and the estate will vest in those who first come *in esse*, subject to open and divest, when others come *in esse*. This rule also extends to wills.

Tenthly. By the rules of the common law, estates, to give rights of enjoyments to different persons in succession, must be limited by way of particular estates and remainders dependent thereon, and no estate can be limited with effect, in derogation or abridgment of a prior estate; but under a conveyance to uses, one estate may be limited, in derogation or in abridgment of another estate, or so as to defeat the same, as in the common case of springing, future, or executory uses, under powers of leasing and jointuring, powers of revocation and new appointment, powers of sale and exchange, provisos of cesser, and powers for shifting the estate on refusal to change the name, or on the accession to an estate, &c. Also an estate may, in a conveyance to uses, be limited by way of interpolation, so as to divide or separate two estates which were before immediately expectant, one on the

other, as in the example of an estate for life limited by way of jointure, between the estates of *A.* tenant for life, with remainder to *B.* in tail.

Eleventhly. By the rules of the common law, one fee cannot be limited after or dependant on another fee; or more generally speaking, no estate can be limited after and dependant on a fee previously limited; but in a conveyance to uses a fee may be limited to one person: and on a given event to happen within the rule prescribed against perpetuities, the fee, or a particular estate, may be limited to another person; as in the common case of settlements to the use of one, and his heirs, till marriage, and afterwards to other persons; and also the common case of a limitation to the use of several persons in fee, with limitations over to take effect eventually, either as between themselves or in favour of strangers. And it follows, that in all these and the like cases, it is necessary to resort to a conveyance to uses to give effect to the intention of the parties, if that intention is to be accomplished immediately, without resorting to any circuitous mode; as a conveyance upon trust, which requires another conveyance; or the ancient practice of a conveyance, subject to a condition which will revest the estate in the grantor. As a general observation, to be understood, perhaps, with some

qualifications, it may be noticed, that any mode of limitation warranted by a declaration of uses in a conveyance, may be introduced into a will. The like observation, as is afterwards noticed, applies to limitations of trust.

Many objects also, as the introduction of powers, &c. &c. may be accomplished through the medium of a conveyance to uses, which cannot be accomplished, or cannot be accomplished with equal certainty and effect, by a bargain and sale, or covenant to stand seised to uses, being assurances depending on contract, and giving uses without the aid of a conveyance. Fines and recoveries with declarations of use, are, in effect and in construction, conveyances to uses. The fine, in one case, and the recovery, in the other case, is the conveyance.

Having now stated the different circumstances under which it is necessary to resort to a conveyance to uses to give effect to the intention of the parties, because the same cannot be accomplished through the medium of a conveyance simply at common law ; several points relevant to the doctrine of uses, and necessary to be observed in preparing conveyances to uses, shall be noticed.

First. There must be a seisin to serve or supply the use, for unless there be an estate to serve the use, no use can arise to be exe-

cuted by the statute; consequently no use can arise from an ownership, which is merely equitable, or from a chattel interest, or an estate in lands, held by copy of court roll. Again, one man cannot covenant that another shall stand seised to an use; also the same person cannot be merely and simply the owner, and also the *cestui que use*. It follows, that a conveyance by *A.* to *B.* in fee, to the use of *B.* in fee, will give the fee to *B.* at the common law; for there is not any use distinct from the seisin, or rather because the seisin of *B.* includes the use. So, if a lease be made to *A.* to the use of *A.* for the lives of himself and two others, this declaration of the use is, in truth, part of the limitation. So if a conveyance be made to *A.* in fee, to such uses as *A.* shall appoint, and in default of appointment to *A.* in fee, these uses are void, since there is not any seisin to supply them, or rather because *A.* cannot be merely and simply a trustee for himself; but a conveyance to *A.* in fee to the use of *B.* for life, remainder to *A.* in fee, is a conveyance to uses for the purpose of raising the estate for life to *B.*; and *B.* will be seised by force of the statute of uses, while the remainder of *A.* being his ownership under the conveyance, will be a seisin by the common law, subject to the estate for life. See Bacon on Uses, and Essay on

Estates. Again, a conveyance to *A.* in fee, to such uses as *B.* shall appoint, and in default of appointment to the use of *B.* in fee, is a conveyance to uses operating on or to arise from the seisin of *A.*: and *B.* may at the same time have a power, and also the fee subject to the power. This was decided in *Sir Edward Clere's case* (t); a case distinguishable from the modern case of *Goodhill v. Brigham*. In that case, properly understood, for it has not always been correctly understood, the power of the wife was bad, because there was not any power distinct from the seisin; and the case turned on the ground, that the wife had merely a *seisin at the common law*; and at the common law, the same person cannot have the fee, and also a power over the fee.

Secondly. A use cannot in the same conveyance, be declared of a seisin, which is executed by force of the statute of uses, for the statute executes only the use in the first degree. Thus, no use can be declared on the seisin of a bargainee or of an appointee of a use, because the appointee or the bargainee has merely a use; and the ulterior use declared of his estate is merely a use on a use, and therefore a trust not executed by the statute of uses. Thus, when

(t) 6 Rep.; 1 Bos. and Pul. 192.

a bargain and sale is made to *A.* in fee, to the use of *B.* in fee, *A.* the bargainee, has merely a use, and the use declared in favour of *B.* is a use in the second degree, or merely a use on a use, and for that reason a trust. So, if an appointment under a power in a conveyance to uses, as distinguished from an appointment under a common law authority in a will, or an authority in an act of parliament, be made to *A.* in fee to uses, the appointee will have an use, and all the ulterior uses declared of *A.*'s estate are uses in the second degree, and therefore trusts not executed by the statute; but though a bargain and sale may not be made to a use declared of the estate of the bargainee, yet if a bargain and sale shall be made to the intent that a common recovery may be suffered to uses, these uses, though in a bargain and sale, will be executed by the statute, because they are to arise on the seisin of the recoveror; and not on the seisin of the bargainee.

These observations also must be confined to bargains and sales of the use and appointments under powers in conveyances to uses; for if an appointment or a bargain and sale be made under an authority in a will, not being a power to appoint to uses, or under an authority given by act of parliament, the bargainee or appointee will be seised by the rules of the common law, and then no

objection exists against declaring an use under his seisin, and to be executed by the statute of uses : nor does the rule apply to new contracts by the bargainee or appointee, &c. after his seisin shall be complete. For though a man derives his title by means of an use executed by the statute, he may by a new bargain and sale, or covenant to stand seised, &c. as well as by a conveyance at the common law, raise a new use on that seisin thus perfected in him.

Another rule is, that the estate arising from a declaration of use cannot be more extensive than the estate out of which it is supplied (v).

The best advice to be offered to the reader, is to pursue this important subject in the books which have been written concerning uses, beginning with Mr. Cruise, then reading Mr. Sanders's more detailed work ; next Mr. Butler's excellent note in Co. Litt. on Uses and Trusts ; then Bacon's Reading on the Statute of 27 Hen. 8. and finally Mr. Sugden's masterly performance on Powers. To the author of these observations, nothing is more gratifying than to recommend these works to the careful perusal and attention of the profession.

Of resulting Uses.

In this place, it should be observed, that when the release is to a man, and his heirs, to the use of him and his heirs, the releasee will be seised under *the rules* of the common law, since he has the seisin at the common law, and the use gives him nothing more or less than he had before (*u*). So if the use be declared in favour of different persons of particular estates, and the ultimate fee be limited to the releasee, he will be seised by the rules of the common law (*w*). But if a particular estate be limited to the use of the releasee, either for life or in tail, this use will be executed by the statute, and consequently he will be seised of that estate, through the medium of the statute.

Sometimes also the declaration of use is considered as part of the limitation of the estate, as in the case of a grant by *A.* to *B.* and his heirs, to the use of *B.* and his heirs, for the lives of *A.* and *B.* without further limitation of use; for in this case the grantee will be seised at the common law, and consequently the use forms part of the limitation of the estate (*x*). But if the grant had

(*u*) Bacon on Uses, 63. Essay on Estates, Introductory Chap.

(*x*) *Jenkins v. Young*, Cro. Car. 230. 244.

(*w*) *Jenkins v. Young*, Cro. Car. 230. Bacon on Uses, 64, c. ib.

been made to one person, and the use had been limited to another person, the use, as distinct from the conveyance, would have been effectual only under the learning of uses.

Doubts have been entertained, whether in case of an omission of the declaration of use in the release, the use will result to the releasor, or whether it will remain in the releasee, even though there be no consideration, except a nominal one of five shillings. See *Shortridge v. Lamplugh* (y). In that case, the decision was against the resulting use; but Lord Ch. J. Holt admitted, that there might be a resulting use on a release.

It is quite clear, that if the release be made for a valuable consideration, or for any purpose which requires that the seisin should remain in the releasee; as to the intent that a common recovery should be suffered; there would not be any resulting use. And it is equally clear, that in all cases a resulting use may be rebutted by internal or external evidence, which shews that the releasee was to be the beneficial owner. But if particular uses are declared, and the fee is left undisposed of, the fee will result to the grantor (z). So if the use of the fee be

(y) 2 Salk. 678.

(z) Co. Litt. 23; Lord Raymond, 802.

limited to the former owner, he will be in of his old use, that is, of a new estate and not the old estate; but this new estate will be descendible in the same manner as the old estate was descendible, and is in law treated as the *old use*.

But if the grantor takes a particular estate for-life, or in fee tail, or if he takes a fee differently modified, as an estate to him and his heirs till marriage; or a fee liable to be defeated by a shifting use; this will be an estate of which he will be considered as the purchasing ancestor, and it will be descendible though a fee, without regard to the descendible quality of the old use. Every will implies a gift, and therefore on a gift by will, no use will arise by implication (*a*). An use may be declared in express terms (*b*); and that use will be executed into estate, although the Statute of Uses was passed prior to the statute of 32 Hen. 8. which authorizes dispositions by will (*c*).

So every gift of a *particular* estate implies a consideration: it creates a service, and therefore no use will result on the gift of a particular estate (*d*); and yet an express use may be declared on the gift of a parti-

(a) Bro. Feoff. al Use, p. 10.

(b) Co. Litt.

(c) Butler's Co. Litt.

(d) Perk. 1. 535. Dyer, 146.
Cruise's Dig. Use, 652.

cular estate. So if the grantee of a particular estate assign his estate, no use will result to him at law. In equity, circumstances may justify the court to declare that there is a resulting trust (e).

Of Trusts.

So also trusts may be, and frequently are, declared in this instrument; and these trusts must depend on the intention of the parties. Every modification of ownership, which is admissible under the learning of uses, is admissible under the learning of trusts; for most trusts are uses, but so circumstanced, that they cannot be executed into estate under the statute. The general rule, that an use cannot be limited on an use; in other words, that an use in the second degree, cannot be executed into estate, is the cause that many trusts, though uses in effect, are not executed by the statute. Thus, under a conveyance to *A.* in fee, to the use of *A.* in fee, in trust for *B.* and his heirs, or to and to the use of *A.* in fee, in trust for *B.* and his heirs; the beneficial ownership, in effect the use, will be in *B.* and yet the statute will not execute

e) *Castle v. Dod*, Cro. Ja. 200.

that use. An impediment arises from the use declared in favour of *A.* though *A.* is to be merely a trustee. This point has been more fully discussed in a former division. At present, it will suffice to notice, that the release should never be made to the use of the releasee, when the intention is to declare, on his seisin, uses to be executed into estate, in favour of other persons under the statute of uses.

Of Covenants.

It remains only to be observed, that the deed should contain such covenants for title as are adapted to the circumstances of the case, and the intention of the parties.



APPENDIX.

FORM I.

Covenant to levy a Fine. The most simple Form.

THIS INDENTURE, made the day
of in the year of the reign of our
sovereign George the 3d, &c. and in the year of
our Lord BETWEEN *A. B.* of, &c. of the
one part, and *C. D.* of, &c. of the other part,
WITNESSETH, that it is hereby declared and agreed
by and between the parties to these presents, and
the said *A. B.* for himself, his heirs, executors,
and administrators, doth hereby covenant and
agree with the said *C. D.*, his heirs and assigns,
in manner following, (that is to say) that he the
said *A. B.* shall or will at his own proper costs
and charges as of Trinity Term now last past, or
in, or as; and before the end of Michaelmas Term
now next ensuing, acknowledge and levy unto
the said *C. D.* and his heirs, before his Majesty's
justices of the Court of Common Pleas at West-
minster, one or more fine or fines, *sur conuzance*
de droit come ceo, &c. with proclamations, ac-
cording to the form of the statutes in that behalf
made and provided, and to be engrossed and re-

corded according to the order and course of fines in such cases used and accustomed, of ALL (*parcels fully*) (*and general words*) AND ALSO of all other the messuages, lands, tenements, and hereditaments, which by the said , &c. were , &c. together with their rights, members, and appurtenances, by the names and descriptions of four messuages, six cottages, one toft, six barns, two dovecotes, seven gardens, six orchards, five hundred acres of land, sixty acres of meadow, seven hundred acres of pasture, and fifty acres of furze and heath, with the appurtenances, in Rudston, and the parish of, &c. or by such other apt, proper, and convenient names, number of messuages, and acres, quantities, qualities, and other descriptions as shall be sufficient to comprise the same. AND it is hereby agreed by and between the parties to these presents, that the fine or fines so as aforesaid, or in any other manner, or at any other time or times, levied or to be levied, AND ALL and every other fine or fines, common recovery or recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter acknowledged, levied, suffered, made and executed, of and concerning the said messuages and hereditaments respectively, or any of them, either alone, or jointly with any other lands, tenements and hereditaments, by or between the said parties to these presents, or any of them, either alone or jointly and together with any other person or persons whomsoever, or to which they or either of them is or are, or shall or may be parties or privies, or party or privy, shall be

and enure, and was and were meant and intended, and is and are hereby directed and declared to be and enure, and the conuzee or conuzees named and to be named in the said fine or fines, and every of them, and his and their heirs, and all and every other person or persons respectively, to whom the said fine or fines, recovery or recoveries, and other assurances respectively, have or hath been, or shall or may be acknowledged, levied, made and executed, shall severally and respectively stand and be seised, As to, for and concerning all and singular the said messuages, lands, and hereditaments, with their rights, members, and appurtenances, *To the use* of the said *A. B.* his heirs and assigns for ever (a), and to no other use whatsoever. *In witness, &c.*

. (a) The uses will be varied according to the circumstances, and there should be recitals and special forms in the *testatum* clause only when circumstances require specification of a particular intention.

FORM II.

*Declaration of the Uses of a Fine; being for the
Benefit of a Purchaser.*

THIS INDENTURE, made the
day of _____ in the year of our Lord
BETWEEN *R. P.* of
Esq. and Catherine his wife, of the first part;
H. K. of _____ gentleman, of the second part;
and *J. M.* of _____ in the county of
Devon, gentleman, of the third part; WITNESS-
ETH, that in pursuance of an agreement in
this behalf, and in consideration of the sum
of £. _____ of lawful money, current in Great
Britain, to the said *R. P.* paid by the said
J. M. before the execution of these pre-
sents, in full for the absolute purchase of
the orchard, close, and hereditaments herein-
after described, and the fee simple and inherit-
ance in possession of the same hereditaments,
with their appurtenances, including the timber
growing thereon, and discharged of land tax
which hath been redeemed, the receipt of which
said sum of £. _____ the said *R. P.* doth
hereby acknowledge, and of and from the same
and every part thereof, doth by these presents

DECLARATION OF USES.

485

acquit, release, and discharge the said *J. M.* his heirs, executors, and administrators; it is hereby directed, declared, and agreed, by and between the said parties to these presents, as far as they respectively are interested, that a certain fine, *sur conuissance de droit come ceo, &c.* levied by the said *R. P.* and Catherine his wife, unto the said *H. K.* and his heirs, of the orchard, close, and hereditaments, hereinafter described among other hereditaments by the names and descriptions of one messuage, &c. with the appurtenances, &c. in Hilary term now last past, and recorded or intended to be recorded as of Hilary term now last past, and all other fines levied or to be levied by the said *R. P.* and Catherine his wife, or either of them, shall as to, for, and concerning all that orchard, and one close, late two closes of land, situate, lying, and being, at or in *W.* in the said parish of *S.* with the appurtenances; (which said orchard doth occupy a site of 1 A. 1 R. 12 P. including the hedges thereunto belonging; and which said close doth occupy a site of 2 A. 2 R. 19 P. including the hedges thereunto belonging,) being a close and hereditament which were formerly purchased by *J. P.* gentleman, who died intestate, of and from *W. W.* and *H. W.* Esq. or one of them, in the year 1741, and the same descended to *R. P.* his eldest son, who devised the same to the said *R. P.* party hereto, his heirs and assigns for ever, subject to a life estate to the Rev. *J. P.* the brother of the said *R. P.* deceased, (being an estate determined by his death,) and also subject to an annuity to *J. P.* his brother (being an annuity which is determined by his death,) and which

will of the said *R. P.* deceased, was proved in the Prerogative Court of Canterbury, on or before the day of and every part and parcel of the same orchard and close, with their and every of their rights, members, and appurtenances, subject nevertheless to such easements of way or passage for drawing water from the well in the said orchard as are of right enjoyed by any person or persons whomsoever, operate and enure unto and to the use of the said *J. M.* his heirs and assigns for ever: AND the said *R. P.* party hereto, having agreed to enter into general covenants for title, therefore the said *R. P.* doth hereby for himself, his heirs, executors, and administrators, covenant with the said *J. M.* his heirs and assigns, that he the said *R. P.* party hereto, is now seised to him and his heirs, of an absolute estate of inheritance in fee-simple, of and in the said orchard, close, and hereditaments, hereinbefore described, and every part of the same, with the appurtenances, without any condition, trust, power of revocation, or of limitation to use or uses, or any other power, restraint, cause, matter, or thing whatsoever, to defeat, make void, lessen, or incumber the same estate, or any part thereof; and also that they the said *R. P.* party hereto, and Catherine his wife, now have in themselves good right, full power, and lawful and absolute authority by these presents, and the fine hereinbefore mentioned, to grant and confirm the same orchard, close, and hereditaments hereinbefore described, and every part of the same, with the appurtenances, unto and to the use of the said *J. M.* his heirs and assigns for

ever; and also that it shall be lawful for the said *J. M.* his heirs and assigns, immediately upon and after the execution of these presents, and at all times hereafter, to enter into and upon, and have, hold, possess, and enjoy the said close, orchard, and hereditaments, hereinbefore described, and every part of the same, with the appurtenances, and to receive and take the rents and profits thereof, without any let, suit, trouble, eviction, ejection, interruption, or denial whatsoever, of or by him the said *R. P.* party hereto, or his heirs, or any other person or persons whomsoever, and free from all incumbrances whatsoever made, done, committed, occasioned, permitted, or suffered by the said *R. P.* party hereto, or any person or persons whomsoever; AND FURTHER that the said *R. P.* party hereto, and his heirs, and all persons lawfully or equitably and rightfully claiming any estate or interest in or to the said close, orchard, and hereditaments hereinbefore described, or any part thereof, shall and will from time to time and at all times hereafter, upon every reasonable request, and at the costs and charges in all things of the said *J. M.* his heirs and assigns, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for further, better, more perfectly, lawfully, and absolutely, or satisfactorily granting, limiting, releasing, confirming, or otherwise assuring the said close, orchard, and hereditaments, hereinbefore described, and every part of the same, with the

appurtenances, unto and to the use of the said *J. M.* his heirs and assigns for ever, according to the true intent and meaning of these presents, as by the said *J. M.* his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required, and be tendered to be made, done, and executed. IN WITNESS, &c.

FORM III.

Declaration of the Uses of a Fine.

THIS INDENTURE, of three parts, made the day of 51st Geo. III. and in the year of our Lord 1811, between *J. D.* of, &c. and Joan his wife, *R. D.* of, &c. and Susannah his wife, *J. D.* of, &c. and *R. D.* of, &c. of the first part; *J. B.* of, &c. of the second part; and *C. D.* of, &c. of the third part. WHEREAS the said *R. D.* and Susannah his wife, *J. D.* and Joan his wife, *J. D.* and *R. D.* have acknowledged and levied, or intend forthwith to acknowledge and levy to the said *J. B.* and his heirs, one fine *sur conuzance de droit come ceo*, &c. of divers hereditaments in the county of Somerset, and among and together with other hereditaments which have been purchased by the said *J. B.* and have been or are intended to be conveyed to uses for the benefit of the said *J. B.* his heirs, appointees, and assigns, all, &c. (*describe the parcels fully*) with their and every of their rights, members, and appurtenances, which said closes, lands, and hereditaments, at the time of levying the said fine, stood limited to the use of the said *J. D.* her heirs and assigns, for ever. AND WHEREAS no uses have been declared of the said fine, so

far as the same relates to, or comprises the said closes, lands, and hereditaments, described in the recitals hereinbefore contained. AND WHEREAS the said *J. D.* is desirous that the same closes, lands, and hereditaments, should henceforth be and become the inheritance of the said *J. D.* her husband, and be settled to the uses, upon the trusts, and for the ends, intents, and purposes, for his benefit, which are hereinafter limited, expressed, declared, and contained, of and concerning the same; and the said *R. D.* and Susannah his wife, *J. D.* and *R. D.* who joined in the said fine, in respect of the hereditaments purchased by the said *J. B.* have at the request of the said *J. D.* and Joan his wife, and for the purpose of conformity, agreed to join in the declaration hereinafter contained, of the uses of the said fine, as to the closes and hereditaments described in the recitals hereinbefore contained: Now THIS INDENTURE WITNESSETH, and it is hereby granted, declared, and agreed by and between all the said parties to these presents, as far as they respectively are interested in the closes and hereditaments mentioned or described in the recitals hereinbefore contained, and they hereby severally and respectively direct and appoint that the fine so as aforesaid, or in any other manner, or at any other time or times to be acknowledged and levied, and also all and every fine and fines, common recovery and common recoveries and other assurances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter acknowledged, levied, suffered, made, and executed, of the said closes, land, and hereditaments, comprised and described in the reci-

tals hereinbefore contained, or any of them, or any part or parcel of the same, either alone or jointly with any other lands, tenements, or hereditaments whatsoever, by or between the said parties to these presents, or any of them, either alone or jointly and together with any other person or persons whomsoever, or to which they or any or either of them is or are, or shall or may be parties or privies, or party or privy, shall be and enure, and shall be construed, adjudged, expounded, decreed, and taken to be and enure, and the same is and are, and was and were meant, intended, and is and are hereby directed and declared to be and enure; and that the person or persons to whom the said fine or fines, common recovery or recoveries, or other assurances respectively, have or hath been, or shall or may be levied, suffered, made, and executed, shall stand and be seised as to, for, and concerning the said closes, lands, and hereditaments, mentioned and described in the recitals hereinbefore contained, and every part and parcel of the same, with the appurtenances, to the uses, upon the trusts, and for the ends, intents, and purposes, hereinafter limited, expressed, declared, and contained, of and concerning the same, that is to say, (*here follow uses to prevent dower.*) IN WITNESS, &c.

FORM IV.

Feoffment made to gain the Freehold by Disscisin.

THIS INDENTURE, made, &c. between *J. C.* of, &c. and *M.* his wife, of the one part, and *A. B.* of, &c. of the other part: WHEREAS the said *J. C.* is desirous of making a feoffment and levying a fine of the messuage or tenement, yard, garden, and hereditaments, hereinafter described, and also granted and enfeoffed, or otherwise assured or intended so to be, and of limiting the same messuage, &c. to the uses hereinafter expressed and declared concerning the same; and the said *M.* the wife of the said *J. C.* hath agreed to join with him in levying a fine of the same messuage, &c. and hereditaments: Now THIS INDENTURE WITNESSETH, that for the purposes hereinbefore expressed, and in consideration of ten shillings of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said *J. C.* well and truly paid by the said *A. B.* before the execution of these presents, the receipt whereof is hereby acknowledged; the said *J. C.* hath given, granted, enfeoffed, and confirmed, and by these presents *doth* give, grant, enfeoff, and confirm unto the said *A. B.* his heirs and

assigns; *ALL, &c. (the parcels and the appropriate general words—and the reversion, &c.)* To HAVE AND TO HOLD the said messuage, or tenement, yard, garden, and hereditaments, hereby granted and enfeoffed, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their appurtenances, unto the said *A. B.* his heirs and assigns for ever; *To THE USE, &c. (Uses to prevent dower. Covenant to levy a fine, with a declaration that the same shall operate.)* To THE USES, upon the trusts, and for the ends, intents, and purposes hereinbefore limited, expressed, and declared, of and concerning the same, in confirmation of these presents, and for the purpose of giving more complete effect to the same. IN WITNESS, &c.

Observation.

There must be a letter of attorney from the feoffor, if absent, to give livery, and from the feoffee, if absent, to receive livery; the feoffor by himself or his attorney should enter in the house, and claim the same as his inheritance: all other persons should thereupon quit the same; afterwards he should deliver the deed prepared from this draft, and then taking the key of the house, deliver the key to the feoffee, in the name of seisin and as seisin of the house and premises, with the appurtenances, to the feoffee, his heirs and assigns, according to the form and effect of the deed. On the deed there should be indorsed a memorandum of the transaction in these words, or to this effect:—

Memorandum—That on the day and year first within written, the within named *J. C.* did enter

upon and take possession of the messuage, or tenement, yard, garden, and hereditaments, described in the within written indenture, and thereby granted and enfeoffed, or expressed so to be, and claimed the same as his inheritance, and having taken possession and seisin thereof, as aforesaid, did make livery of seisin of the same messuage, &c. to the within named *A. B.* to have and to hold to the said *A. B.* his heirs and assigns, according to the form and effect of the within written indenture.

N. B. If livery be given or received by attorney, the fact should be so stated.

FORM V.

Feoffment and Covenant to levy a Fine.

THIS INDENTURE, of five parts, made, &c. between *J. L.* of, &c. and Sarah his wife, of the first part; *G. S.* of, &c. and Frances his wife, of the second part; *T. L.* of, &c. of the third part; *J. F.* of, &c. and *B. W.* of, &c. of the fourth part; and *J. J. A.* of, &c. and *W. W.* the younger, of, &c. of the fifth part. WHEREAS the said *J. L.* is seised to him and his heirs in fee-simple (subject to the title of dower of the said Sarah his wife) of five-eighth parts of the manor, messuages, lands, and hereditaments, hereinafter enfeoffed, or otherwise assured, or intended so to be, and the said *G. S.* is seised to him and his heirs in fee-simple, subject to the title of dower of the said Frances his wife, of the remaining three-eighth parts of the same manor, messuages, lands, and hereditaments. AND WHEREAS the said manor, messuages, lands, and hereditaments, have been lately sold in lots to several persons; and for the purpose of bringing the evidence of title to the same manor and hereditaments into a narrow compass, and for extinguishing all dower, right and title of dower, of the said *S. L.* and *F. S.* it hath been advised, determined, and agreed, that a feoffment should be

made, and a fine levied of the same manor, messuages, lands, and hereditaments, and such uses declared thereof as are hereinafter mentioned. Now THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of ten shillings of lawful money current in Great Britain to each of them the said *J. L.* and Sarah his wife, *G. T.* and Frances his wife, well and truly paid by the said *T. L.* immediately before the execution of these presents, the receipt whereof is hereby acknowledged, they the said *J. L.* and Sarah his wife, *G. S.* and Frances his wife, according to their respective shares, estates, and interests, in the manor and hereditaments, *have*, and each and every of them *hath* given, granted, and enfeoffed, and by these presents, *do*, and each and every of them *doth* give, grant, and enfeoff, unto the said *T. L.* his heirs and assigns forever, ALL, &c. (*parcels fully*,) and all and singular messuages, &c. and all other the manor or reputed manor, messuages, lands, tenements, and hereditaments, and parts and shares of manors, messuages, lands, tenements, and hereditaments, of them, the said *J. L.* and *G. S.* and each or either of them, situate, lying, and being, in the parish of *R.* in the said county of *Q.* and every part and parcel of the same, with their and every of their rights, members, and appurtenances, and the reversion, &c. and all the estate, &c. To HAVE AND TO HOLD the said manor, messuages, lands, tenements, and hereditaments, and all and singular other the premises hereby granted and enfeoffed, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and

appurtenances, unto the said *T. L.* his heirs and assigns for ever, to the use of the said *T. L.* his heirs and assigns for ever, upon the trusts herein-after expressed and declared, of and concerning the same, (that is to say) as to, for, and concerning those five undivided eighth parts thereof, now or late of the said *J. L.* (the said manor and hereditaments being considered as in eight equal parts or shares to be divided,) in trust for the said *J. L.* his heirs and assigns for ever, and as to, for, and concerning the remaining three undivided eighth parts thereof, the whole in eight equal parts to be divided, in trust for the said *G. S.* his heirs and assigns for ever. . And the said *J. L.* doth hereby for himself, his heirs, executors, and administrators, and as far as relates to and concerns the five eighth parts of the said *J. L.* of and in the said manor, &c. hereby granted and enfeoffed, or otherwise assured, or intended so to be, and the acts, deeds, and defaults of himself, and his said wife, *relating to the same parts or shares.* AND the said *G. S.* doth, &c. covenant with the said *T. L.* his heirs, &c. [*here add covenant to levy a fine sur conuizance de droit come ces, and so forth (common form), with a declaration to enure*] TO THE USES, upon the trusts, and for the ends, intents, and purposes, hereinbefore limited, expressed, declared, and contained, of and concerning the same, in confirmation of these presents, and for giving more full and complete effect to the same. And the said *J. L.* and Sarah his wife, *G. S.* and Frances his wife, &c. (*letter of attorney to deliver possession in common form,*) and the said *T. L.* &c. (*letter of attorney to receive possession in common form.*) IN WITNESS, &c.

FORM VI.

*Demise of Term for Years, by Way of Mortgage,
being an Underlease, by a Trustee, of atten-
dant Terms, and a Confirmation and Lease by
the Reversioner.*

THIS INDENTURE, of three parts, made
the day of 55 Geo. III. A. D.
1815, BETWEEN *R. J.* of, &c. of the first part;
B. C. W. of, &c. of the second part; and *S. R.*
of, &c. of the third part: WHEREAS the said *R. J.*
is seised to him and his heirs in fee simple of the
messuage, farm, and lands, hereby bargained, sold
and demised, or otherwise assured, or intended so
to be, with their rights, members, and appurte-
nances, subject, nevertheless, to one or more term
or terms for years now vested in the said *B. C. W.*
as a trustee for the said *R. J.* and to attend the
inheritance of the same messuage, farm, lands,
and hereditaments; AND WHEREAS, on the ap-
plication, and at the instance and request of the
said *R. J.* the said *S. R.* hath agreed to advance
and lend to the said *R. J.* the sum of three thou-
sand pounds at interest, on the security made by
these presents, and the bond of the said *R. J.*
hereinafter mentioned. And the said *B. C. W.* on
the application of the said *R. J.* hath consented

and agreed to execute these presents for the purpose of giving effect to the demise hereinafter contained, and made by him *the said R. J.* Now **THIS INDENTURE WITNESSETH**, that in pursuance of the said agreement, and also in consideration of three thousand pounds, of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said *R. J.* advanced and lent by the said *S. R.* at or before the execution of these presents, the receipt of which said sum of three thousand pounds, the said *R. J.* doth hereby acknowledge, and of and from the same sum, and every part thereof, doth acquit, release, and discharge the said *S. R.* his heirs, executors, administrators, and assigns for ever, by these presents; and in consideration of ten shillings, of like lawful money, to the said *B. C. W.* also paid by the said *S. R.* the receipt whereof is hereby acknowledged, he the said *B. C. W.* at the instance and request, and by the direction and appointment of the said *R. J.* and by way only of demise, or other assurance, and not of covenant, or warranty, *hath* demised, leased, and to farm let, and by these presents, *doth* demise, lease, and to farm let, and the said *R. J.* *hath* granted, bargained, sold, demised, ratified, and confirmed, and by these presents *doth* grant, bargain, sell, demise, ratify, and confirm, to the said *S. R.* his executors, administrators, and assigns, **ALL** that messuage, farm, and lands, commonly called, known, and distinguished by the name of *P.* in the county of *G.* which said messuage, farm, and hereditaments, are now in the tenure or occupation of *J. J.* farmer, at the yearly rent of £. or some such rent; **AND** all houses, cottages, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards,

closes of land, meadow and pasture feedings, woods, underwoods, and the ground and soil thereof, common and commons of pasture and of turbarry, and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, watercourses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever, to the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, or any of them respectively belonging; or in anywise appertaining, or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed; as part, parcel, or member of the same, or any of them respectively, AND the reversion and reversions, remainder and remainders, yearly and other rents and profits, of the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, (*add grant of deeds:*) TO HAVE AND TO HOLD the said messuage, farm, lands, hereditaments, and all and singular the premises, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their, and every of their rights, members, and appurtenances, unto the said *S. R.* his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the term or time of two hundred years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste, subject nevertheless to the proviso or agreement for redemption hereinafter contained, *yielding and pay-*

ing for the same messuage and hereditaments, yearly and every year, during the said term hereby granted, the rent of one pepper corn, if the same rent should be lawfully demanded; PROVIDED ALWAYS, and it is hereby declared and agreed by and between the parties to these presents, as far as they respectively are interested, and the true intent and meaning of them and of these presents are, and these presents are upon this express condition, that if the said R. J. his heirs, executors, administrators, or assigns, do and shall well and truly pay or cause to be paid, unto the said S. R. his executors, administrators, or assigns, the full sum of three thousand pounds, of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, at or in the common dining hall of the Inner Temple, London, upon the day of which will be in the year of our Lord 1816, and in the mean time do and shall half yearly (that is to say) on the day of and the day of during the continuance of the said sum of three thousand pounds on this security, well and truly pay or cause to be paid to the said S. R. his executors, administrators, or assigns, at or in the same place, interest for the said sum of three thousand pounds, at and after the rate of five pounds for one hundred pounds for a year; and if the said R. J. his heirs, executors, administrators, or assigns, do and shall pay the said principal sum of three thousand pounds, and the interest thereof, without any deduction or abatement whatsoever, out of the same principal money and interest, or any part thereof, for and in respect of any taxes, charges, rates, assessments, payments, or

impositions, at any time or times heretofore, and to be at any time and from time to time hereafter, taxed, charged, assessed, or imposed on the said messuage, farm, lands, and hereditaments, hereby bargained, sold and demised, or otherwise assured, or intended so to be, or upon the said sum of three thousand pounds, and interest, or any part thereof, or upon the said *S. R.* his executors, administrators, or assigns, or any other person or persons whomsoever, on account or in respect of the said sum of three thousand pounds, or the interest thereof, or any part of the same respectively, or upon account or in respect of the said messuage, farm, lands, and hereditaments, hereby bargained, sold and demised, or otherwise assured, or intended so to be, or any of them, or any part of the same, by authority of parliament or otherwise howsoever, or upon account or in respect of any other matter, cause, or thing whatsoever, other than and except the present or any future tax on property or income, then and in that case immediately after such payment shall be made as aforesaid, the said term of two hundred years, and also one bond or writing obligatory, bearing even date with these presents, given and entered into by the said *J. B.* to the said *S. R.* in the sum of six thousand pounds, and conditioned to be void on payment of the sum of three thousand pounds and interest for that sum, the said bond and these presents being given for securing one and the same sum of three thousand pounds and its interest, and not divers sums and their interest, shall cease and be void to all intents and purposes whatsoever, any thing hereinbefore, or in the said bond contained to the contrary in anywise notwithstanding, And the said *B. C. W.*

for himself, his heirs, executors, and administrators, doth by these presents covenant and declare to and with the said *S. R.* his executors, administrators, and assigns, that he the said *B. C. W.* hath not at any time or times heretofore made, done, executed, or committed, or willingly or knowingly suffered any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, or any part thereof, are, is, can, shall, or may be impeached, charged, encumbered, or in anywise affected in title, charge, estate, or otherwise howsoever. And the said *R. J.* doth hereby, for himself, his heirs, executors and administrators, covenant, promise, and agree to and with the said *S. R.* his executors, administrators, and assigns, that he the said *R. J.* his heirs, executors, administrators, and assigns, or some or one of them, shall or will well and truly pay, or cause to be paid, unto the said *S. R.* his executors, administrators, or assigns, the said principal sum of three thousand pounds, and the interest thereof, at the rate aforesaid, at the time and place hereinbefore appointed for payment thereof, without any deduction or abatement, on any account whatsoever, except as aforesaid, and according to the true intent and meaning of these presents. And also that the said *R. J.* and *B. C. W.* now have in themselves respectively good right, or full power and lawful and absolute authority by these presents to bargain, sell, demise, and confirm the said messuage, farm, lands, and hereditaments hereby bargained, sold, and demised, or otherwise assured, or intended so to

be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said *S. R.* his executors, administrators, and assigns, for and during the said term or time of two hundred years, according to the true intent and meaning of these presents. AND ALSO that immediately after default shall be made in payment of all or any part of the said sum of three thousand pounds and interest, contrary to the true intent and meaning of these presents, and the proviso or agreement for redemption hereinbefore contained, and thenceforth from time to time during the residue of the said term of two hundred years, it shall and may be lawful to and for the said *S. R.* his executors, administrators and assigns, to enter into and upon, and have, hold, use, occupy, possess, and enjoy the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part and parcel of the same, according to the true intent and meaning of these presents, without any lawful let, suit, trouble, eviction, ejection, expulsion, interruption, or denial whatsoever, of, from, or by them, the said *R. J.* or *B. C. W.* or either of them, or any other person or persons whomsoever, (other than and except the person or persons whose estate or interest, or several estates or interests, is or are hereinafter excepted, for or in respect, and only for or in respect of the same estate or interest, or several estates or interests) and free and clear, and

freely, clearly, and absolutely acquitted, exonerated, released, and discharged, or otherwise, by him the said *R. J.* his heirs, executors, or administrators, at his or their own costs and charges, in all things well and sufficiently protected, defended, saved harmless and kept indemnified, of, from, and against all and all manner of former and other gifts, grants, feoffments, mortgages, leases, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, wills, intails, annuities, legacies, rents-charges, rents-seck, rents-service, and all arrears of rent, and also of, from, and against all and all manner of fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, suits, decrees, debts of record, debts to the king's majesty, or any of his predecessors, sequestrations, estates, titles, troubles, liens, charges, and incumbrances whatsoever at any time or times heretofore, and to be at any time and from time to time hereafter had, made, done, committed, occasioned, permitted or suffered by the said *R. J.* or any other person or persons whomsoever, the land tax ~~charge~~ or chargeable upon, and which henceforth shall become payable for the same messuage, farm, lands, and hereditaments, or any of them, and a rent-charge of four hundred pounds payable to *Johanna J.* widow, for her life, out of the same messuage, farm, lands, and hereditaments, and other hereditaments, and the term, estate, or interest, of the said *J. J.* always excepted. AND FURTHER, that the other hereditaments, which are charged or chargeable with or liable to the payment of the said annuity, or yearly rent-charge of four hundred pounds, shall exclusively of and by way of indem

nity to the messuages, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, be the fund for answering and paying the same annuity or yearly rent-charge. AND MOREOVER that he the said R. J. and his heirs, and all persons whosoever lawfully or equitably and rightfully claiming, or to claim any estate, right, title, trust, charge, or interest at law or in equity, of, in, to, out of, or upon the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, or any of them, or any part thereof (other than and except the person or persons whose estate or interest, or several estates or interests, is or are hereinbefore excepted, for or in respect of the same estate and interest, or several estates or interests,) shall and will from time to time, and at all times, upon every reasonable request of the said S. R. his executors, administrators, and assigns, and at the costs and charges in all things of the said R. J. his heirs, executors, administrators, or assigns, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, devices, conveyances, and assurances in the law whatsoever, for further, better, more perfectly, lawfully, and absolutely or satisfactorily bargaining, selling, demising, confirming, or otherwise assuring the said messuage, farm, lands, and hereditaments, hereby bargained, sold and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their

rights, members, and appurtenances, unto the said *S. R.* his executors, administrators, and assigns, for and during the residue of the time of the said term of two hundred years, according to the true intent and meaning of these presents, as by the said *S. R.* his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required: AND it is hereby declared and agreed by and between the said *R. J.* and *S. R.* and the said *R. J.* doth hereby consent and agree that in the mean time, and until default shall be made in payment of all or some part of the said sum of three thousand pounds, and the interest thereof, contrary to the true intent and meaning of these presents, and the proviso of agreement for redemption hereinbefore contained, it shall and may be lawful to and for the said *R. J.* his heirs or assigns, or the said *B. C. W.* his executors, administrators, or assigns, as such trustee or trustees, to hold, occupy, enjoy, and receive and take the rents and profits of the said messuage, farm, lands, and hereditaments hereby bargained, sold, and demised; or otherwise assured, or intended so to be, and every part and parcel of the same, with the rights, members, and appurtenances, without any let, suit, or interruption whatsoever, of, from, or by the said *S. R.* his executors, administrators, or assigns, or, of, from, or by any person or persons, rightfully claiming, or to claim, by, from, under, or in trust for him or them, any thing hereinbefore contained to the contrary notwithstanding
IN WITNESS, &c.

FORM VII.

*Confirmation of a Lease to the Assignee thereof,
and Defeazance reviving Condition, or rather
creating a new Condition.*

THIS INDENTURE, made the said
day of between A. B. of, &c. of the one
part, and the bailiffs, burgesses, and commonalty
of the town or borough of L. in the county of
S. of the other part. WHEREAS by indenture
bearing date on or about the 27th day of October,
in the year 1781, and made between the said bailiffs,
burgesses, and commonalty, of the one part, and
S. D. of, &c. of the other part, all that messuage,
&c. with the appurtenances, were demised, by the
said bailiffs, burgesses, and commonalty, unto the
said S. D. his executors, administrators, and as-
signs, to hold from the day of the date of the said
indenture, for a term of thirty-one years, thence
next ensuing, at a yearly rent, by the same in-
denture reserved, and subject to several cove-
nants and conditions therein contained, such
conditions being to the same effect as the condi-
tions contained in the defeazance (a) hereinafter in-

(a) The assignment should precede the defeazance.

serted: AND WHEREAS the said *S. D.* hath assigned the messuage, or tenement and premises, unto the said *A. B.* his executors, administrators, and assigns, for the residue of the said term of thirty-one years: AND WHEREAS such assignment was made with the approbation of the said bailiffs, burgesses, and commonalty, upon the terms that the said *A. B.* should execute the defeazance hereinafter contained; and in consideration thereof the said bailiffs, burgesses, and commonalty, agreed to confirm unto the said *A. B.* the said lease, and the term thereby granted. NOW THIS INDENTURE WITNESSETH, that in consideration of the premises, the said bailiffs, burgesses, and commonalty, do by these presents ratify and confirm unto the said *A. B.* his executors, administrators, and assigns, the said in part recited indenture of lease, and the messuage or tenement and premises thereby demised as aforesaid, or intended so to be, with the appurtenances, and all the term, estate and interest therein which was granted as aforesaid, subject nevertheless to the reservation, covenants, conditions, and agreements, in the said indenture of lease contained, and on the part of the lessee, his executors, administrators, and assigns, to be observed, performed, fulfilled and kept: AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and performance of the said agreement, on the part of the said *A. B.* and in consideration of the premises, it is hereby declared by and between the parties to these presents; and the said *A. B.* doth by these presents, for himself, his executors and administrators, grant unto the said bailiffs, burgesses, and commonalty, their successors and

assigns, that, &c. [*here repeat the condition*] then, &c. [*here take the conclusion of the condition.*] And the said *A. B.* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said bailiffs, burgesses, and commonalty, and their successors and assigns, that he the said *A. B.* his heirs, executors, or administrators, shall and will, from time to time, and at all times hereafter, during the residue of the said term of thirty-one years, or which shall first happen, until he or they shall have assigned the said demised premises, with such license and consent as aforesaid, well and truly pay, or cause to be paid, unto the said bailiffs, &c. and their successors, for the time being, the said yearly rent, by the said recited indenture reserved and made due and payable, on the days and times thereby appointed for payment thereof, and perform, fulfil, and keep all and singular the covenants, clauses, and agreements, in the same indenture contained, and which on the tenant or lessee's part and behalf are or ought to be paid, done, and performed, any thing hereinbefore contained to the contrary notwithstanding. IN WITNESS, &c.

The form of a demise, to protect against *forfeiture* (a), may, *mutatis mutandis*, be adapted to the case of a lease preparatory to a *fine*.

The forms of farming and other leases will be found in the book of precedents, except that the substance of the covenants should be governed by the usage.

(a) See Vol. I. p. 468, 472.

FORM VIII.

Lease, or Bargain and Sale for a Year.

THIS INDENTURE, made the day
of in the 55th Geo. III. &c. and in the
year of our Lord 1815, between *W. B.* of Lincoln's
Inn, in the county of Middlesex, Esquire, of the
one part; and *W. L.* of the honourable society of
Lincoln's Inn, Esquire, of the other part; WIT-
NESSETH, that in consideration of five shillings, of
lawful money, current in Great Britain, paid to the
said *W. B.* by the said *W. L.* the receipt whereof is
hereby acknowledged, the said *W. B.* hath bargain-
ed and sold, and by these presents doth bargain
and sell, unto the said *W. L.* his executors, adminis-
trators, and assigns, ALL those chambers, &c. and
all rooms, &c. [*parcels and general words, as in the
release;*] TO HAVE AND TO HOLD the said cham-
bers, hereditaments, and all and singular other the
premises hereby bargained and sold, or intended
so to be, with the appurtenances, unto the said
W. L. his executors, administrators, and as-
signs, from the day next before the day of the
date of these presents, for the term or time of one
whole year thence next ensuing, and fully to be
complete and ended, yielding and paying there-
fore unto the said *W. B.* his heirs or assigns, the
rent of one pepper-corn, on the last day of the

said term, if the same rent should be lawfully demanded, to the intent and purpose that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said *W. L.* may be in the actual possession of all and singular the chambers and hereditaments, hereby bargained and sold, or intended so to be, with the appurtenances, and be thereby enabled to accept and take a grant and release of the reversion and inheritance of the same premises, to him, his heirs and assigns, in such manner and form as shall be expressed in and by an indenture intended to bear date on the day next after the day of the date, and executed after the execution of these presents, and to be made between the said *W. B.* of the one part, and the said *W. L.* of the other part. IN WITNESS, &c.

In a conveyance to uses, change the form thus:
 To such uses, upon such trusts, and for such ends, intents and purposes, as shall be declared thereof, in or by a certain indenture of release already prepared, and to be executed after the execution of these presents, the said indenture of release being made or expressed, or intended to be made between _____ of the first part;
 _____ of the second part; _____ of the third part, &c. &c. IN WITNESS, &c.

Different forms of *Releases* will be found in the first volume: superseding the necessity of inserting other Forms of Releases in this Volume.

FORM IX.

Feoffment with Covenant to levy a Fine, and Letter of Attorney to receive, and Letter of Attorney to give Livery.

THIS INDENTURE, of five parts, &c. made BETWEEN *J. L.* of, &c. and *Sarah* his wife, of the first part; *G. S.* of, &c. and *Frances* his wife, of the second part; *T. L.* of, &c. of the third part; the Rev. *J. F.* of, &c. and *B. W.* of, &c. of the fourth part; and *J. A.* of, &c. and *W. W.* of, &c. of the fifth part, WHEREAS the said *J. L.* is seised to him and his heirs, in fee-simple (subject to the title of dower of the said *Sarah* his wife,) of five eighth parts of the manor, messuages, lands, and hereditaments, hereinafter described, and also enfeoffed, or otherwise assured, or intended so to be; and the said *G. S.* is seised to him and his heirs, in fee-simple (subject to the title of dower of the said *Frances* his wife,) of the remaining three eighths of the same manor, messuages, lands, and hereditaments. AND WHEREAS the said manor, messuages, lands, and hereditaments, have been lately sold in lots, to several persons; and for the purpose of bringing the evidence of title to the same manor and hereditaments into a narrow

compass, and for extinguishing all dower, right and title of dower of the said *Sarah L.* and *Frances E.* it hath been advised, determined, and agreed that a feoffment should be made, and a fine levied, of the same manor and hereditaments. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of ten shillings of lawful money, current in Great Britain, to each of them the said *J. L.* and *Sarah* his wife, *G. L.* and *Frances* his wife, well and truly paid by the said *T. L.* immediately before the execution of these presents, the receipt whereof is hereby acknowledged, they the said *J. L.* and *Sarah* his wife, *G. S.* and *Frances* his wife, according to their respective shares, estates and interests in the said manor and hereditaments, HAVE, and each and every of them, hath given, granted, and enfeoffed, and by these presents DO and each and every of them DOth give, grant, and enfeoff, unto the said *T. L.* his heirs and assigns for ever, all, &c. [*parcels and general words*] and the reversion, &c. and all the estate; TO HAVE AND TO HOLD the said manor, messuages, lands, hereditaments, and all and singular other the premises hereby granted and enfeoffed, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said *T. L.* his heirs and assigns for ever, to the use of the said *T. L.* his heirs and assigns for ever, upon the trusts hereinafter expressed and declared, of and concerning the same, (that is to say) as, to, for, and concerning those five undivided eighth parts thereof, now or late of the said *J. L.* (the whole in eight equal parts or

shares to be divided,) in trust for the said *J. L.* his heirs and assigns for ever, and as, to, for, and concerning the remaining three undivided eighth parts thereof, (the whole in eight equal parts to be divided,) in trust for the said *G. S.* his heirs and assigns for ever: AND the said *J. L.* doth hereby for himself, his heirs, executors, and administrators, and as far as relates to and concerns the five eighth parts of the said *J. L.* of and in the said manor, messuages, lands, and hereditaments, hereby granted and enfeoffed, or otherwise assured, or intended so to be, and the acts, deeds, and defaults of himself and his said wife, relating thereto, and the said *G. S.* doth hereby for himself, his heirs, executors, and administrators, and as far as relates to and concerns the said three eighth parts of the said *G. S.* of and in the said manor, messuages, lands, and hereditaments hereby granted and enfeoffed, or otherwise assured, or intended so to be, and the acts, deeds, and defaults of himself, and his said wife, relating thereto, covenant and agree with the said his heirs and assigns, in manner following, that is to say, that they the said *J. L.* and *Sarah* his wife, and *G. S.* and *Frances* his wife, shall and will, at the proper costs and charges of the said *J. L.* and *G. S.* in or as of term now last past, or before the end of term now next ensuing, or in or as of some other subsequent term, acknowledge and levy unto the said *T. L.* and his heirs, before his Majesty's Justices of the court of Common Pleas, at Westminster, one or more fine or fines *sur conuissance de droit come ceo, &c.* with proclamations to be thereupon had and made according to the form of the statutes in that case made and

provided, and the usual course of fines in such cases used of the said manor, messuages, lands, and hereditaments, hereby granted and enfeoffed, or otherwise assured, or intended so to be, with the rights, royalties, members, and appurtenances, by the names and descriptions of

or, by such other apt and convenient names, number of messuages and acres, quantities, qualities, and other descriptions, to comprise the same, as by the said T. L. his heirs or assigns or his or their counsel in the law shall be reasonably advised, or devised and required. And it is hereby granted, declared, and agreed by and between all the said parties to these presents, as far as they respectively are interested in the premises, and they hereby severally and respectively direct and appoint, that the fine or fines to be so as aforesaid, or in any other manner, or at any other time or times acknowledged and levied, and also all and every fine and fines, common recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter acknowledged, levied, suffered, made, and executed of the said manor, messuages, lands, and hereditaments hereby granted and enfeoffed, or otherwise assured or intended so to be, or any of them, or any part or parcel of the same, either alone or jointly with any other lands, tenements, or hereditaments whatsoever, by or between the said parties to these presents, or any of them, either alone, or jointly and together with any other per-

son or persons whomsoever, or to which they or any or either of them is or are, or shall or may be parties or privies, or a party or privy, shall be and enure, and shall be construed, adjudged, expounded, decreed, and taken to be and enure, and the same is and are, and was and were meant and intended, and is and are hereby directed and declared to be and enure. AND that the person or persons to whom the said fine or fines, and other assurances respectively have or hath been, and shall or may be levied, suffered, made, and executed, shall stand and be seized, as, to, for, and concerning the said manor, messuages, lands, and hereditaments, hereby granted and enfeoffed, or otherwise assured or intended so to be, and every part, and parcel of the same, with their, and every of their rights, royalties, members, and appurtenances, to the uses, upon the trusts, and for the ends, intents, and purposes, hereinbefore limited, expressed, declared, and contained, of and concerning the same, in confirmation of these presents, and for giving more full and complete effect to the same. AND the said *J. L.* and *Sarah* his wife, and *G. S.* and *Frances* his wife, have, and each and every of them hath nominated, constituted, and appointed, and by these presents do, and each and every of them doth nominate, constitute, and appoint the said to be their and each of their lawful attorney, for them, and each, any, or either of them, and in their, and each, or any of their names respectively, to enter into and take full, quiet, and peaceable possession and seisin of all and singular the aforesaid manor, messuages, lands, and hereditaments, or some part thereof, in the name of all the same manor and hereditaments, and

then to deliver full, peaceable, and quiet possession and seisin thereof in the name of the whole, to the said *T. L.* or to his attorney or attorneys lawfully authorized, according to the form, effect, true intent and meaning of these presents. AND the said *T. L.* hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint, the said his true and lawful attorney for him and in his name and stead to receive and take of and from the said *J. L.* and *Sarah* his wife, *G. S.* and *Frances* his wife, or any or either of them, either in person or by his or their attorney or attorneys lawfully authorized in that behalf, possession and seisin of all and singular the said premises, or of some part thereof, in the name of all the same manor and hereditaments; and such possession and seisin so taken thereof, To HOLD and to keep to the use of the said *T. L.* his heirs and assigns, according to the effect, true intent and meaning of these presents. IN WITNESS, &c.

FORM X.

*Form of Grant of several attendant Terms by
way of Underlease.*

AND IT IS ALSO WITNESSED, that, in further pursuance of the said resolutions, and for carrying the same into effect, and in consideration of ten shillings to each of them the said several parties hereto of the second and third parts paid by the said *R. C.* and *E. J.* they the said several persons, parties hereto of the second and third parts, according to their several and respective estates, rights, and interests, and at such request, and with such privity, consent, and approbation, and testified as aforesaid, *do*, and each and every of them *doth* demise, lease, set, and to farm let unto the said *R. C.* and *E. J.* their executors, administrators and assigns, ALL such and so many, and such parts of *all* and singular the castle, manors, or lordships, or reputed manors or lordships, messuages, farms, lands, and hereditaments whatsoever, comprised in the said indentures of lease and release, and bargain and sale, and each or either of them, as are now vested in the said several persons, parties hereto of the second and third parts respectively, or any of them, for any term or terms of years in mortgage, for securing

any gross sum or sums of money and interest w-
ing to them, or to those for whom they are trus-
tees, or for any term or terms for years, for secur-
ing any annuities to them respectively, or to those
for whom they are trustees, with their and every
of their rights, royalties, members, and appurte-
nances ; To HOLD the same castle, manors, and
other hereditaments, with their appurtenances,
unto the said *R. C.* and *E. J.* their executors, ad-
ministrators, and assigns, henceforth for and dur-
ing the term or several terms for years which each
of the said persons respectively, parties hereto of
the second and third parts, hath in the same castle,
manors, and hereditaments respectively, except
the last day of each of the same terms (being an
exception made to the intent and for the purpose
of preventing the merger of any of the same
terms) NEVERTHELESS UPON TRUST for such per-
son and persons, and to and for such ends, in-
tents, and purposes, and to be from time to time
assigned and disposed of in such manner and
form in all respects, as the said *L. S.* and *L. S.* the
younger, or the survivor of them, his heirs or as-
signs, or the trustee or trustees who from time to
time shall be substituted in his or their place or
stead shall direct and appoint ; and that the said
L. S. and *L. S.* the younger, and the survivor of
them, his heirs or assigns, shall from time to
time, and at all times during the continuance
of the same several and respective terms, and in
the mean time, and until such assignment or
assignments shall be made, be interested in and
have the direction of the same terms respectively
upon, under, and subject to the same or the like
trusts, and for the same or the like ends, intents,

and purposes, in all respects, as are hereinbefore expressed and declared concerning the inheritance of the said hereditaments and premises, or as near thereto as may be, and the circumstances of the case and the nature of the tenure or estate, and the rights of the persons beneficially interested will admit: and (subject thereto) UPON THIS FURTHER TRUST, that the said *R. C.* and *E. J.* and the survivor of them, his executors, administrators, and assigns, do and shall assign the said castle, manors, hereditaments, and premises, for all the then residue of the several and respective terms hereby demised therein, unto such person and persons, and for such ends, intents, and purposes, as the said *C. Lord C.* and *J. E. A.* or the survivor of them, his heirs or assigns, or the trustee or trustees for the time being of the said recited indentures of release and bargain and sale, shall direct or appoint. There followed,

A covenant from each of them the said several parties thereto of the second and third parts severally, separately, and from the others of them that he had not done any act to encumber.

AN
ANALYTICAL DIGEST,

BY WAY OF

INDEX TO THE PRINCIPAL POINTS IN THIS VOLUME.

	Page.
ACTION of debt or covenant is not maintainable by the original lessor against an under-lessee - - -	127
A right of action is releasable, and not by the common law transferable - - -	269
AGREEMENT. It depends on the intention of the parties whether an instrument shall operate as an agreement or as a lease - - -	174, 177
When there are words of demise in the present tense the instrument will be a lease - - -	178
ALIEN may stand seised to an use, but such use will be void as against the crown - - -	247, 269
An alien may be a cestui que use for the benefit of the crown - - -	263, 379
ANCIENT DEMESNE. Lands of the tenure of ancient demesne may become frank-fee by fine, &c. &c. -	100
With the distinctions, - - -	ib.
ANNUITY. A personal annuity in fee cannot be created without a lien binding the heirs - - -	469
APPORTIONMENT. Form granting an apportionment of rent in a release - - -	464
ASSIGNEE AND ASSIGNMENT. Assignee of a lease -	47
may be a releasee - - -	47
An instrument purporting to be a lease operates as an assignment when it transfers all the estate of the termor - - -	124
And operates as an under-lease when it leaves a reversion in the termor, though for an hour, &c. -	125
The estate of an under-lessee is not capable of enlargement by release from the original lessor, while the original lessee's estate is continuing - - -	127
Of grants of attendant terms by under-lease - - -	129
ATTAINED PERSON may stand seised to an use -	246
Such use will be void as against the crown or the lord -	247
The cestui que use will be entitled to hold the land till office found - - -	269

ATTAINED PERSON—*continued.*

May alien after crime committed and before attainder as against the lord claiming by escheat	- 260
But not as against the lord claiming the benefit of forfeiture	- ib.
In case of attainder for treason there is forfeiture, and the forfeiture relates to the time of the crime committed	- ib.
He may be a cestui que use	- 263
After attainder he may bar an estate-tail and remainders over	- ib.

ATTENDANT TERMS. When there is an under-lease, and it is purchased by the owner of the inheritance in the name of a trustee, it will not attend the inheritance without express declaration.

Under-leases by the trustees of these terms frequently convenient	- 127
Cautions to be observed in this mode of practice	- 129

ATTORNEY to give or receive livery may be appointed by indenture, although not a party to it - 400
Livery of an infant by attorney is void.

ATTORNMENT was necessary at common law on a grant of a remainder or reversion, or of services - 210

AVOIDANCE. See *Estate of Freehold, Leases for Years, Condition.*

B.

BARGAIN AND SALE.

A lease for years by words of demise may operate as a bargain and sale when there is a consideration of money or money's worth	- 225, 233
Inquiry whether a bargain and sale by a corporation is good	- 234, 253
By a corporation sole during the continuance in office of the bargainer	- 253, 258
By tenant in tail passes a base fee voidable only, and not void as against the issue	- 264
Money or money's worth is necessary to support a bargain and sale	- 373
Words of conveyance will be sufficient in a bargain and sale	- 377
Uses declared upon a bargain and sale of an use are mere trusts	- 482
On a bargain and sale in execution of a common-law authority, uses may be declared	- 483
Uses may also be declared in a bargain and sale of the seisin passing by a recovery thereby agreed to be suffered	- ib.

BARON AND FEME. See *Husband and Wife.*

C.

- CESTUI QUE TRUST** is not liable to a distress by his trustee for rent, unless he occupies under an express agreement with his trustee - - - 289, 290
- The estate of a cestui que trust may be enlarged by a release from his trustee - - - 289, 303
- Joining in a conveyance by lease and release is not considered a necessary party to the lease for a year - 367
- The practice is to make him a party - - - 308
- CHILD UNBORN** cannot take the first estate in a grant at common law - - - 475
- But may under a limitation of uses, or a devise by will ib.
- CHURCHWARDENS**, incapable of being grantees in that character - - - 378
- COMMONERS** of a waste incapable of being grantees in that character - - - 378
- CONDITION.** No advantage can be taken of a condition by any one besides the grantor or his representatives 201
- A condition not to assign in a lease to A. and his assigns is repugnant - - - 195
- But otherwise of a condition not to assign to a particular person, or without consent, &c. - - - ib.
- A condition not to assign does not extend to an underlease - - - 127, 192
- If waived in one instance by an assignment with license, is dispensed with entirely - - - 198
- A new defeazance may be annexed to an assignment of a term of years to protect the reversioner - - - 199
- An execution sued fraudulently to alien will be a breach of a condition not to assign - - - 194
- Difference between conditions in leases giving a right of entry, and conditions avoiding the lease - - - 195
- A dispensation with any part of a condition is a dispensation with the condition entirely - - - 197
- Observations on the different forms of conditions in leases and mortgages - - - 199
- A condition binds the remainder-man entering by force of the remainder, although not a party to the deed - 412
- See *Defeazance*.
- CONFIRMATION.** A release from disseisee to lessee of disseisor may operate as a confirmation - - - 351
- The effect of a confirmation by the reversioner of a lease for years by tenant for life is to make the term absolute - - - 134
- CONSIDERATION** in a deed unnecessary at common law 420
- Is not an essential part of a declaration of uses - - 78
- Useful to support the deed against creditors - - - ib.
- Money or money's worth is necessary to support a bargain and sale of an use - - - 373

CONSIDERATION—*continued.*

Different forms of stating the consideration in a release	421
Inquiry whether in the absence of a consideration in a release the use will result to the releasor	486
Every gift of a particular estate implies a consideration	487
No resulting use will arise from its absence	ib.
There may be a resulting trust upon the assignment of the particular estate in the absence of a consideration	488

CONTINGENT INTERESTS may be bound in equity by contract for valuable consideration	269
<i>Wright v. Wright</i> , 1 Ves. 409, is in point.	
But are not assignable at law	ib.
Of the legal ownership cannot be released by way of enlargement of estate	268
But may by way of <i>mitter le droit</i> , or extinguishment	ib.
May be bound by estoppel	ib.
Are devisable	269
Exceptions to this rule, as a gift to the survivor, &c.	270

CONTINGENT REMAINDERS may be destroyed by a release from the reversioner or remainder-man to the particular tenant merging his estate which supported the contingent remainders	342
The destruction of contingent remainders by the merger, &c. of the particular estate, is confined to legal interests	343

CONVEYANCES TO USES to be perfected by fines or recoveries may vest the estate before the fine is levied, &c.	4, 46
Under a conveyance to the intent to suffer a recovery or levy a fine, the uses are executory only till recovery suffered, &c.	5, 46
The uses declared of the recovery, &c. may be varied with the consent of all persons concerned in interest	45, 49

COPARCENER. A coparcener may release in enlargement of the estate of a lessee, &c. holding under him	271
---	-----

A COPYHOLDER has an estate capable of enlargement by release	284
---	-----

CORPORATION. An aggregate corporation cannot make a lease without deed	163
May be a cestui que use	263
It is said it can give an use, but cannot stand seised to an use	372
When a corporation conveys by lease and release the practice is to complete the lease by entry	234, 253, 258
They generally convey by feoffment	372

COVENANTS. No persons except representatives and assignees can take the benefit of or be bound by a covenant, unless named as a party, when the deed is expressed to be made between parties	397
---	-----

	Page.
COVENANTS—continued.	
One who is no party to the deed may be bound if he seal the deed, and the deed is poll or not between parties - - - - -	410
A grantee entering and agreeing to a grant by deed containing covenants, is bound by inherent covenants, although he never executed the deed - - - - -	415
A covenant by tenant in tail does not bind the issue - - - - -	92
Cautions required in the framing of covenants for the acts of strangers or infants when adult - - - - -	89
A covenant to stand seised by tenant in tail is good, if the use may arise in his life-time - - - - -	265
COVENANT. The form by which a husband covenants for himself and his wife is inaccurate - - - - -	83
Whether the wife shall be bound in equity by a covenant to levy a fine entered into by the husband with her consent - - - - -	84
A feme covert may be a covenantee where the covenant is entered into by any other person than her husband - - - - -	90
Covenants for title in leases by tenant in tail should be restricted to the interest of the lessor - - - - -	132
Different forms for the lien part of covenants - - - - -	82
General observations on covenants in leases - - - - -	204
COVENANT TO STAND SEISED must operate on the seisin in the covenantor	
One man cannot covenant that another shall stand seised to uses - - - - -	481
A covenant by tenant in tail to uses to commence after his death will be inoperative - - - - -	265
COVENANT TO LEVY A FINE. Parts in the form of - - - - -	79
1. Of the covenantor - - - - -	80
2. Of the person with whom the covenant is to be entered into - - - - -	90
3. Of the person by whom the fine is to be levied - - - - -	91
4. Of the time within which it is to be levied - - - - -	92
5. Of the person to whom it is to be levied - - - - -	94
6. In what court and at whose expense and request - - - - -	98, 104
7. Of the parcels - - - - -	106
8. Whether with proclamations - - - - -	109
D.	
DATE. See <i>Deed</i> .	
Observations on the mode of dating the lease and release. The lease and release may be dated on the same day - - - - -	361, 363, 386
The date of a deed is not conclusive evidence of the time of execution - - - - -	365
A deed may be dated or executed on a <i>Sunday</i> without prejudice - - - - -	362
DAY OF THE DATE is exclusive or inclusive, as the intention may require - - - - -	387

INDEX.

537

Page.

DECLARATION OF THE USES OF A FINE already levied, whether it must be by deed indented	- - - 41
DECLARATION OF USES	- - - 110
Observations on the form of in a release	- - - 473
DEED executed on a <i>Sunday</i> is binding	- - - 362
DEED-POLL. Every person is a party to a deed-poll who is named actively or passively	- - - 394, 412
DEEDS. Separate deeds may be on the same parchment	- 417
Observations on the clause granting the deeds	- - 466
Several deeds may be parts of the same assurance	- 24
Deeds of conveyance to uses, to be perfected by subsequent fines or recoveries, operate of themselves as conveyances	- - - - 4
See <i>Uses</i> .	
DEEDS TO LEAD THE USES of fines or recoveries do not pass any estate of themselves, they are only directory until fine levied, &c.	- - - 2, 7, 11
Are part of the same assurance with the fine or recovery	3
Of the general rules which govern them	- - 7
Where a fine is levied conformably to all the circumstances of an agreement, no inferior evidence can be received that the fine was levied to other uses	7, 11, 13
But the uses declared upon such deed may be varied by deed, subsequent and before the fine, &c.	- - - 14
But not after the fine, &c.	- - - 19
Whether the concurrence of all the parties to the deed though not concerned in interest, is necessary to such variation	- - - 15
If the deed be not pursued in all its circumstances by the fine, &c. inferior evidence may be admitted that the uses were varied by subsequent agreement	- - 8, 21
Parol evidence of such variation cannot be received since the statute of frauds	- - - 21
Although all the circumstances of the deed be not pursued, the deed shall govern the fine, if no subsequent agreement can be proved	- - - 8, 23
A deed leading the uses of a fine, need not be executed by the conuzee, though it is advisable that he should execute	- - - 67
See <i>Uses</i> .	
DEEDS TO DECLARE THE USES of fines already levied, and recoveries already suffered, operate on the seisin of the conuzee or recoveror, not on the resulting use of the owner	- - - 4
Whether they must of necessity be indented	- - 41
Cannot control uses declared precedent or contemporaneous to the fine or recovery	- - - 42
Nor affect any estate conveyed out of the resulting use of the owner in the mean time	- - - ib.

	Page.
DEEDS TO DECLARE THE USES—continued.	
Must be made during the life and ownership of the persons levying the fine or suffering the recovery -	26, 42
Ought to be executed by the conuzee -	67
Such execution is not essential, though highly advisable	ib.
<i>Of the Parts of a Deed of Uses.</i>	
1. The denomination or style of the deed -	71
2. The date -	72
3. The parties -	73
4. The recitals -	74
5. The testatum clause -	76
6. The agreement to levy the fine or recovery -	78
7. The declaration of uses -	111
See <i>Condition</i> .	
DEFEASANCE of an estate of freehold, must be either by a condition in the deed creating the estate, or by a deed executed at the same time -	
	166, 199
Of a term of years may be by deed executed at any time after the creation of the term -	167, 199
Partakes in some degree of the nature of a surrender -	203
See <i>Condition</i> .	
DESCENT. How the descent of a fee-simple acquired by tenant in tail by descent, under a gift to his father and mother, is to be regulated -	
	283
A rent reserved on a grant in fee, made by a person seized <i>ex parte materna</i> , will, as a new acquisition, descend to his heirs generally -	188
DESCRIPTION. The effect of an uncertain or erroneous one upon the grant -	
	449, 451
See <i>Parcels</i> .	
DISCONTINUANCE. A conveyance by lease and release cannot effect a discontinuance of seisin -	
	236, 238
DISSEISEE. He cannot convey by lease and release, or any other mode -	
	264, 268
He may release by way of <i>mitter le droit</i> -	269
DISSEISIN. Circumstances under which it must be made to be confined to a disseisin of a particular estate -	
	323
Of a tenant for life, unless confined to a claim of his estate, is a disseisin of the reversioner -	317
DISPOSSESSION of a tenant for years is not necessarily a disseisin of the reversioner, it may be confined to the tenancy for years -	
	317
So of tenant for life -	ib.
Or of any other particular tenant -	321
A person entering claiming under a void feoffment or grant is considered as entering by disseisin -	310

INDEX.

539

	Page.
DISSEISOR of feoffee to uses is not bound by the uses	- 262
A disseisor can release to the disseisee	- 269
A disseisor of a particular estate may become tenant by acceptance of rent by the reversioner	- 323
After such acknowledgment of his tenancy he is capable of a release from the reversioner in enlargement of his estate.	
DISTRESS cannot be made upon a cestui que trust unless he occupies under an express contract with his trustee	- 289, 290

E.

EQUITABLE ESTATES may be transferred without livery or a lease as a foundation for a release. <i>Wright v. Wright</i> , 1 Vea. 409	- 369
ESTATES OF FREEHOLD cannot be confirmed for a part of the time only, though a term of years may	- 164
A defeasance of an estate of freehold must, at the common law, be either by a condition in the deed creating the estate or by deed executed at the same time	- 46, 166, 169, 476
An estate of freehold cannot at common law be made to cease by condition without entry	- 167, 197
A different rule prevails in limitations to uses and executory devises	- 168, 197, 476
An avoidance of an estate of freehold must, at the common law, be <i>in toto</i> if at all	- 167
In limitations of use and executory devises there may be a partial avoidance	- 167, 477
A remainder for life to a person not <i>in esse</i> will be good	- 153
It is doubtful whether an estate may be made to one for his own life and the life of another not <i>in esse</i>	- 153, 154
An estate for the successive lives of persons unborn is bad, as tending to a perpetuity	- ib.
An estate to A. and his executors for years, if he and his heirs shall so long continue, is good	- 155
An estate in fee determinable or defeasible is not capable of enlargement by release, but the determinable quality may be discharged by a release of the possibility	- 471
An estate-tail may be enlarged by the release of the reversioner or remainder-man	- 275
The estate-tail will not be absolutely merged by the accession of the fee	- 286
An estate for years may be acquired by adverse claim, but cannot be created by disseisin	- 322
When an estate <i>pur autre vie</i> is limited to the heirs, executors, administrators, and assigns of the grantee, it will descend to the heir	- 469

	Page.
ESTATES OF FREEHOLD—continued.	
It is not necessary on an assignment to name either heirs or executors in order that all the estate should pass - - - - -	469
Estates of freehold must be limited to take effect immediately - - - - -	470
Except in conveyances to uses and wills, and in things created <i>de novo</i> - - - - -	475
ESTOPPEL. A lease may be binding by estoppel - - - - -	136, 148
So may a fine - - - - -	137
An estoppel must be mutual - - - - -	139
Who may make estoppels - - - - -	268, 269, 271
EVIDENCE. Parol evidence is inadmissible to vary the uses of a fine, although the fine may not have followed the circumstances of the deed declaring the uses - - - - -	21
But written evidence may be received in such case, although not by deed - - - - -	8, 21
EXCEPTIONS. See <i>Deeds</i> .	
EXECUTION. See <i>Sunday, Condition, Deed, Lease and Release</i> .	
Of a deed on a <i>Sunday</i> does not validate the deed - - - - -	362
Of the order of the execution of the lease and release - - - - -	242, 364, 386
EXECUTOR possessed of a term in right of his testator is capable of a release in enlargement of his estate - - - - -	331
A freehold lease limited to heirs and executors will belong to the heirs - - - - -	469
EXPECTANCIES. See <i>Heirs</i> .	
May be bound by estoppel - - - - -	271
And by contract in equity - - - - -	ib.
EXTINGUISHMENT. See <i>Descent</i> .	
A possibility under an executory devise is not extinguished by descending upon the person seized of the land subject to that executory devise - - - - -	278
The principles of this doctrine examined - - - - -	ib.
F.	
FEE. One fee may be expectant on another in the case of a fee after an estate-tail changed into a base fee - - - - -	275, 472
A base fee derived from an estate-tail may be enlarged by a release from the owner of the fee expectant on the estate-tail - - - - -	277, 472
A determinable fee may be discharged of its determinable quality by release of the right - - - - -	274, 471
It cannot be enlarged in point of estate - - - - -	ib.
FELONY. See <i>Attainted Person</i> .	

INDEX.

541

Page.

FEME. COVERT may take the benefit of a covenant when the covenant is entered into by any other person than her husband - - - - -	90
Whether she shall be bound by consenting in a covenant by the husband to levy a fine - - - - -	84
See <i>Husband</i> .	
FEOFFMENT operates by livery of seisin - - - - -	208, 273
By an infant is voidable only when he makes livery in person, is void when makes livery by attorney - - - - -	249
Nothing passes by a feoffment before livery - - - - -	218
Inconvenience of this assurance.	
Feoffment by tenant for life and the next remainderman, having an estate of inheritance, is a rightful conveyance - - - - -	310
A person entering under a void feoffment is considered as a disseisor - - - - -	ib.
A lease and release cannot be pleaded as a feoffment - - - - -	238
FINE. See <i>Uses</i> . When no uses are declared on a fine or recovery the use will result to the former owners according to their ownerships - - - - -	64
Whether it can be held to enure to the uses of more than one deed - - - - -	9, 24
When levied after conveyance it must enure in confirmation of that conveyance, and cannot be declared to new uses without the consent of all persons concerned in interest under that conveyance - - - - -	44, 45
Such consent must be expressed by matter equally solemn as that by which the conveyance was made - - - - -	45
Objections to the effect of a fine are not sustainable by a purchaser without evidence or presumption of defectiveness - - - - -	75
A fine and declaration of uses is a sufficient conveyance without a lease and release - - - - -	77
A fine operates as a conveyance whenever the conuzor has a seisin - - - - -	ib.
A fine of lands in ancient demesne levied in the courts at Westminster is voidable by the lord - - - - -	98
But is good till avoided - - - - -	98, 99
Fine levied in the court of ancient demesne cannot be proclaimed without a custom - - - - -	ib.
The effects of a fine in ancient demesne - - - - -	ib.
When a fine is levied to two it should be to them and the heirs of one of them - - - - -	90, 94
A fine to bar by nonclaim must be levied by or to a person who has a vested estate of freehold - - - - -	95
Fines may operate by estoppel - - - - -	137
See <i>Table of Contents for other Particulars</i> .	

FORFEITURE FOR FELONY AND HIGH TREASON.

See *Attainted Person*

G.

GRANT was used at common law to pass estates in reversion and remainder and incorporeal subjects and services - - - - -	209
Must be of an estate in reversion or remainder, and not in possession - - - - -	235
Must be by deed - - - - -	221
A release may operate as a substantive grant when it is made by the owner of a reversion or remainder - - -	332, 439
A grant to several will be good to those alone who are capable - - - - -	ib.
A person entering under a void grant is a disseisor. - - -	310
GRANTEE. Who may be a grantee - - - - -	378, 475
GRANTOR must be a party to the deed - - - - -	394

H.

HABENDUM. Its effect when to a person not named in the grant - - - - -	380
If inconsistent with the grant will be rejected - - -	439
If not absolutely inconsistent will qualify the grant - -	440
Its effect in qualifying the grant - - - - -	146, 179
May vitiate the grant - - - - -	441
Observations on the form of the habendum in leases - -	180
in leases for a year - - - - -	385
in releases - - - - -	467
HEIRS. A lease <i>pur autre vie</i> limited to heirs and executors shall devolve to the heirs - - - - -	469
HUSBAND may stand seised to the use of his wife - - -	262
Cannot covenant for himself and his wife, so as to subject the wife to an action - - - - -	83
A husband seised in right of his wife is capable of a release in enlargement - - - - -	331
He cannot grant to his wife at common law - - - - -	475
But may through the medium of uses - - - - -	ib.

I.

INFANTS. Conveyances by infants by deed, or by livery by attorney, are void, except leases at rent; by livery in person are voidable only - - - - -	248, 249
See <i>Child unborn</i> .	
INTERESSE TERMINI. Under a lease at common law the lessee has only an <i>interesse termini</i> till entry - -	145
Lease of a reversion or remainder in corporeal hereditaments without deed operates by way of <i>interesse termini</i> - - - - -	149
An <i>interesse termini</i> is no estate - - - - -	215
Is no foundation for a release - - - - -	273

INDEX.

543

Page.

J.

JOINT TENANT may be a releasor	- - -	271
Words to negative a joint-tenancy in the habendum	-	471
Under uses several persons may take as joint-tenants		
although they take at different periods	- -	478
But not at common law	- - -	477
Questioned by Lord Raymond.		

K.

KING OR QUEEN cannot stand seized to an use	- -	251
Cannot make a bargain and sale	- - -	ib.

L.

LEASE. Of the several parts of this assurance.		
1. Of the style and date	- - -	169
2. Of the parties	- - -	ib.
3. Of the consideration	- - -	171
4. Of the operative words	- - -	172
5. Of the parcels	- - -	178
6. Of the exceptions	- - -	180
7. Of the habendum	- - -	ib.
8. Of the reservation or reddendum	- - -	184
9. Of the conditions	- - -	190
10. Of the covenants	- - -	201
Definition of a lease	- - -	124
Distinction between a lease and an under-lease	- -	ib.
A lease at common law does not confer any estate till entry	- - -	145
Of leases by a reversioner	- - -	144, 149
Leases of the reversion of an estate for years without deed operate only by way of <i>interesse termini</i>	- -	149
Leases granted by tenant for life confirmed by the reversioner, are absolute for the term	- -	133, 142
And upon the death of the tenant for life the lessee will become the tenant of the reversioner	- -	142
By particular tenant and reversioner	- -	ib.
By corporations aggregate must be by deed	- -	163
Of leases by parol	- - -	148, 149
Of reversionary leases	- - -	146
Distinctions between freehold leases and leases for years determinable on lives	- - -	162
Different modes of limiting leases for lives	- -	151
Leases for lives under powers may be created without livery of seisin	- - -	147
And may be made to commence in <i>futuro</i>	- -	181
A lease <i>pur autre vie</i> limited to heirs and executors shall devolve to the heirs	- - -	469
Leases of things lying in grant must, to pass the reversion, be by deed	- - -	147

	Page.
LEASES— <i>continued.</i>	
Leases of freehold interests at the common law to commence in <i>futuro</i> , are void	156
Otherwise under powers, &c.	181
Will be good if livery of seisin be made after the day has arrived	157
LEASES FOR YEARS. When leases for years must be by deed	147, 163
They must have a certain commencement and continuance	158, 181
May have a collateral determination	159
Instances of such collateral determinations	182
May be defeated by a condition or subsequent defeazance	162
Of the commencement	160, 181
May commence in <i>futuro</i>	162
Limited from a day that is past, commences in point of title from the execution of the deed	161
Gives no right to the profits from the time appointed for the commencement	ib.
Lease for so many years as A. shall name is good only from nomination	159
He must name during the lives of the lessor and lessee	ib.
Lease for years may cease for a time and be in <i>esse</i> for a time	164, 167
Avoidance of lease by tenant of a particular estate is only an avoidance <i>pro tanto</i>	142
By the owner of a freehold estate	
May operate either as a demise at common law, or as a bargain and sale, at the election of the lessee	225, 233
A general entry of the lessee shall not be a determination of his election	226
LEASE FOR A YEAR. Of its form,	
1. Of the date	361
2. Of the parties	366
3. Of the consideration	373
4. Of the grantor	374
5. Of the operative words	376
6. Of the grantee	377
7. Of the parcels	380
8. Of the habendum	385
9. Of the reddendum	387
10. Of the declaratory clause	389
Mode of reciting the lease in the release	442
The object in taking a lease for a year, when the purchaser already has a particular estate, is to have evidence of the existence of a particular estate	353, 360
When the conveyance is made by a corporation there should be an entry, and a memorandum of entry on the lease for a year	468
Lease for a year not used in Ireland, in Jamaica, and some other of the West India islands	444

INDEX.

545

	Page.
LEASE AND RELEASE. Of its form. See <i>Release</i> .	
Origin of the conveyance - - - -	208, 219
Principles on which it is grounded - - - -	217
Of its parts - - - -	239
Passes no more than the releasor may lawfully grant	236, 238
Does not divest or discontinue estates in remainder or reversion, or purge disseisins - - - -	ib.
Cannot be pleaded as a feoffment - - - -	238
The lease should be executed before the release - - - -	242
Consequence of loss of the lease for a year - - - -	ib.
A lease and release by an infant is deemed void - - - -	249
By a tenant in tail is good as against himself, and voidable only as against the issue - - - -	264, 272
By a corporation aggregate should have an entry on the lease prior to the release - - - -	234, 253, 256
By a corporation sole entry is not absolutely necessary	254
<i>Sed quare</i> - - - -	258
Must be of a vested estate, and not of a possibility or mere right - - - -	268
An instrument in the form of a lease and release may operate as a release of the possibility or right - - - -	473
When the bargainee in the lease, and the releasee in the release, are different persons - - - -	379
Lease and release may be supported, although they are both dated on the same day, or the release is executed before the lease - - - -	363, 386
LESSEE entering and agreeing to the lease is bound by the covenants, although he never executes the lease - - - -	415
At the common law has no estate till entry - - - -	273
Under a bargain and sale for years he has an estate immediately - - - -	ib.
LIVERY OF SEISIN must be made by a person in possession, or with the consent of the person in possession - - - -	208
LOSS. Consequence of the loss of the lease for a year - - - -	242

M.

MERGER. Effect of the merger of the estate of an under-lessee in the estate of his lessor - - - -	126
The reversion of a termor will prevent the merger of the estate of an under-lessee in the estate of any other person - - - -	ib.
One estate for years may merge in another - - - -	130, 336
A determinable fee carved out of an estate-tail may merge in the fee expectant on the base fee - - - -	277, 472
A subsequent estate cannot merge in a prior estate - - - -	334
MESNE. Instances of privity notwithstanding mesne estate	338
MISTAKE in naming the grantee supplied in construction - - - -	433
MONK , as dead in law, was incapable of being a grantee - - - -	378
Or a cestui que use - - - -	379

MONSTER is incapable of a grant - - - -	Page. 1.1 - 378
MORTGAGES. Observations on the mode of penning the condition for ceasing the mortgagee's estate - -	200
On the proviso for reconveyance on payment of mortgage money - - - -	202
MORTGAGOR occupying as tenant at will is capable of a release from the mortgagee in enlargement of estate -	291

N.

NAME. A mistake in or omission of the name of the releaser in the granting part - - - -	483
Will be supplied by construction from the context -	ib.
NOTICE. Absence of receipt for consideration money is implied notice that it remains unpaid - - - -	429

O.

OMISSION. See <i>Name</i> .	
OPERATIVE WORDS. In bargains and sales for years -	377
In leases - - - -	172
In a lease for a year - - - -	376
In a release - - - -	446

P.

PARCELS. Necessity of their accuracy in the leases for a year - - - -	380
How to be described in the lease when granted in the release by schedules - - - -	381
Different modes of describing them in the lease for a year - - - -	ib.
Modes of describing them in the release - - - -	446
In beneficial leases - - - -	178
PARISHIONERS incapable of being grantees in that capacity and by that name - - - -	378
PARTY. A man must be a party to a deed to take an immediate estate by the rules of the common law -	394
Or to be a grantor - - - -	ib.
Not necessary to be a party to take a remainder, or an use, or the benefit of a trust - - - -	ib.
Every person is a party to a deed-poll who is named actively or passively - - - -	394, 412
A person covenanting or taking the benefit of a covenant must be a party, if the deed is expressed to be made between, &c. - - - -	397
An attorney to deliver seisin need not be named as a party to the indenture - - - -	400
PAYMENT of purchase money will be presumed after length of time - - - -	429
The absence of a receipt is presumptive notice that the money is unpaid - - - -	ib.

INDEX.

547

Page.

PERPETUITIES. Application of the rule against perpetuities to leases for lives of persons unborn, &c.	153, 154, 156
POSSESSION. The statute of uses does not give an actual possession without entry	391
The phrase 'in possession' is in many books used for vested in interest.	
POSSIBILITY. A possibility of reverter is not grantable	276, 473
Whether a possibility under an executory devise shall be extinguished by descending on the person having the fee subject to that executory devise	278
A possibility coupled with an interest is devisable	269
May be released by way of extinguishment	ib.
May be bound by estoppel	ib.
May be bound in equity by contract	ib.
<i>See Contingent Interest, Expectancy.</i>	
PRIVITY OF ESTATE. General nature of	327
Of the privity necessary between a releasor and releasee to the validity of a release	324, 329
Of the want of privity because the estate of the releasee is derived out of a mesne subsisting estate	352
Cases of immediate privity	337
Cases of privity notwithstanding a mesne estate	338
Instances of privity because a derivative estate is discharged from its original privity	344
Of mere privity of tenure for the sake of remedy, and not of estate	345
PROVISO FOR REDEMPTION. Observations on the mode of penning it in mortgages	206
PURCHASER. In what cases he may object to a title on the ground of a defect in a fine	75
A purchaser from tenant by statute or elegit has a redeemable interest	301
PURCHASE MONEY. See <i>Payment.</i>	

Q.

QUEEN cannot stand seized to an use	251
--	-----

R.

RECEIPT FOR PURCHASE MONEY. Its absence is implied notice that the money remains unpaid	429
Modes of stating the receipt in the deed	421, 428
RECITAL. Whether the recital of the lease for a year operates as evidence or estoppel	443, 452
Mode of reciting the lease	442
A recital of the fact of possession is sufficient evidence of a particular estate to support a release	292
How far a recital is evidence	309

RECITAL—*continued.*

Mistake in the recital of a lease for a year is not material. *Ramsbottom and others v. Tunbridge*, 2 Maule and Selwyn, 525.

RELEASE IN ENLARGEMENT. Its form,

1. Of the date	- - - - -	393
2. Of the parties	- - - - -	394
3. Of the testatum clause	- - - - -	421
4. Of the parcels	- - - - -	446
5. Of the habendum	- - - - -	467
6. Of the declaration of uses	- - - - -	473
7. Of trusts	- - - - -	488
8. Of covenants	- - - - -	489
Who may grant by release	- - - - -	392
Doctrine of releases at common law	- - - - -	210, 268
To operate by way of enlargement must be to a person having a vested estate in possession, reversion, or remainder, and not to one having a mere right, interest, or possibility	- - - - -	211, 245, 271
Privity of estate between releasor and releasee is essential	- - - - -	324
Release from reversioner to underlessee during the continuance of the interposed estate will not enlarge the estate of the underlessee	- - - - -	352
Cases in which there is privity sufficient to support a release, notwithstanding a mesne estate	- - - - -	338
Release to a tenant at sufferance will not pass any estate	- - - - -	359
May be made to—		
Tenant for years	- - - - -	284, 289
Tenant for life	- - - - -	ib. 289
Tenant <i>pur autre vie</i>	- - - - -	ib.
Tenant in tail	- - - - -	ib. 285
Tenant in tail after possibility of issue extinct	- - - - -	289
Tenant at will	- - - - -	288, 289
Tenant by statute-merchant	- - - - -	289, 392
Tenant by statute-staple	- - - - -	392
Tenant by elegit	- - - - -	289, 392
Tenant in dower	- - - - -	285
But not till she has an estate	- - - - -	ib.
Tenant by the curtesy	- - - - -	ib.
Copyholder	- - - - -	289
Cestui que trust	- - - - -	ib.
Mortgagee holding at will of mortgagor	- - - - -	302
To the tenant of every particular vested estate	- - - - -	284
To the owner of a determinable or defeasible fee unless derived from an estate-tail	- - - - -	471
To one possessed of a particular estate in <i>autre droit</i> , as trustee, husband, &c.	- - - - -	331
To a particular tenant after a partial alienation, provided he retains a reversion	- - - - -	349

INDEX.

549

Page.

RELEASE IN ENLARGEMENT—*continued.*

To a man who has a base fee derived from an estate-tail	472
To executors having a chattel interest for payment of debts	300
May not be made to a tenant for life while disseised	351
But may extinguish a rent	ib.
A release from a disseisee to a lessee of disseisor passes no estate	ib.
It may operate as a confirmation	ib.
Under some circumstances a release may be made to a person coming in by disseisin	323
A release from a disseisor to a disseisee operates as a release of right	269
A release to tenant in tail will operate by enlargement, but will not occasion a merger of his estate	286
8c A release to a trespasser will not pass an estate by enlargement	288, 302
An assurance failing of effect, as a release in enlargement of estate, may have some other operation	359
May operate as a grant if there be a particular estate outstanding to create a reversion in the releasor	332
A release executed before the lease for a year, as part of the same transaction, might probably be supported	364
Effect of a release to husband and wife jointly, where the particular estate was the wife's	333
Instances in which a release may operate notwithstanding there is an interposed estate between the estates of the releasor and releasee	338
Cases in which a release from the reversioner or remainder-man will destroy an interposed contingent interest	342
Effect of a release from a reversioner in fee who has also an estate for life in possession to the tenant of an intermediate estate-tail	344
e ² See <i>Lease and Release.</i>	

RELEASE OF RIGHT. A release to the owner of a determinable or defeasible fee can operate only as a release of right	471, 473
Unless the determinable fee arises from an estate-tail	472

RELEASEE. Who may be a releasee in respect of personal qualification	273
In respect of estate	ib.

RELEASOR. Who may be	245, 271
See <i>Release (passim,)</i> and <i>Table of Contents.</i>	
Omission of the name of the releasor in the granting part may be supplied in construction	483

REMAINDER, will pass by the name of a reversion	463
Of the description by which it should be granted	ib.
The estate of a remainder-man may be enlarged.	

	Page.
REMAINDER-MAN entering by force of his remainder, is bound by a condition, although not a party to the deed	412
So by a rent	413
He may enlarge the estate of a particular tenant, notwithstanding a mere remainder	339
RENT. The rent reserved on a lease shall belong to the reversioner	170, 185
Rent reserved upon a grant in fee made by a man seized <i>ex parte materna</i> shall descend to his heirs generally, because it is a new acquisition	188
Coparceners shall take a rent reserved on a grant by them in fee as joint-tenants. <i>Sed quare</i>	ib.
The remedy for rent against an underlessee is lost by the merger or destruction of the estate of the original lessee	357
A remedy for rent, &c. is given by statute, notwithstanding the surrender of an original lease, for the purpose of a renewal	358
A remainder-man entering by force of his remainder is bound to pay the rent reserved, although he be not a party to the deed	413
A reservation of rent is not material in a bargain and sale for a year, if there be a pecuniary consideration	388
The mere reservation of a rent is a sufficient consideration for a bargain and sale	ib.
Whether it is sufficient for that purpose if reserved to a stranger	ib.
A rent may be extinguished by a release from the reversioner, although in consequence of a disseisin no estate remains in the releasee	351
RENT CHARGE may be conveyed by lease and release, or mere grant	235
See <i>Rent</i> .	
RESULTING USE. See <i>Tenant in Tail—Uses</i> .	
REVERSION. The reversion cannot be granted for an estate of freehold to commence <i>in futuro</i> under a common-law grant	155
Will pass by the name of a remainder	463
The description by which it should be granted	ib.
RIGHT OF ENTRY OR ACTION cannot be released by way of enlargement, but may by way of <i>mitter le droit</i>	270, 278
But is not devisable	270
Is no foundation for a release by way of enlargement	273

INDEX.

581

Page.

S.

SCHEDULES. Of the convenience in using schedules in describing parcels - - - - -	453
SEISIN. A seisin in law is a sufficient ownership for a release by way of enlargement - - - - -	274
SUNDAY. See <i>Deed</i> - - - - -	362
SURRENDER. A tenant by statute-merchant, statute-staple, or elegit, may surrender to the reversioner - - -	298

T.

TENANT AT WILL. His estate is capable of enlargement by release - - - - -	284
TENANT IN COMMON may be a releasor to his tenant or lessee - - - - -	271
Mode of limitation to tenants in common in the habendum - - - - -	470, 471
Of the words which are sufficient to negative joint-tenancy in conveyances to uses - - - - -	471
TENANT BY INTIRETIES, may be a releasor to his tenant - - - - -	271
TENANT IN TAIL. A covenant by tenant in tail to stand seised will operate when the use may arise in his life-time - - - - -	265
May stand seised to an use by express declaration - - -	255
But not by implication - - - - -	ib.
Observations on leases by tenant in tail - - - - -	131
A grant or lease to commence after his death is void - -	133
Cannot take back his estate-tail by resulting use - - -	64
Is able to make, and is also capable of a release in enlargement of estate - - - - -	284
A lease and release by tenant in tail will pass a base fee voidable by the issue - - - - -	264, 273
TENANT FOR LIFE, is capable of a release in enlargement of his estate - - - - -	284
So is a tenant <i>per autre vie</i> - - - - -	ib.
TENANT BY ELEGIT OR STATUTE is capable of a release in enlargement of his estate - - - - -	292
May surrender to the reversioner - - - - -	298
His estate may be confirmed by the reversioner - - -	ib.
TERMS. See <i>Attendant Terms</i> - - - - -	199
TITHES may be conveyed by lease and release, or by mere grant - - - - -	236

	Page.
TITHES — <i>continued.</i>	
Lease of tithes must be by deed, unless granted with and as parcel of the rectory, or to the tenant by way of contract to retain - - - - -	147
TRESPASSER has no estate capable of enlargement by release - - - - -	288, 302
TRUST. A resulting trust may arise from the want of a consideration and the absence of limitation - - -	420
Even in cases of an assignment of a particular estate	488
Of declarations of trust in a release - - - - -	ib.
TRUSTEE. The trustee of a particular estate is capable of a release by way of enlargement - - - - -	331

U.

UNDER-LEASE AND UNDER-LESSEE. An under-lease necessarily leaves a reversion in the grantor	124, 126
Is not a breach of covenant not to assign - - - - -	127
Convenience of under-lease in arrangements respecting attendant terms - - - - -	ib.
The benefit of an under-lease will not attend the inheritance by the implication of a court of equity - - -	129
But may by express declaration - - - - -	ib.
Will not be defeated by the merger, surrender, or forfeiture of the estate out of which it is derived - - -	134
UNDER-LESSEE. His estate cannot be enlarged by a release from the original reversioner during the continuance of the interposed estate - - - - -	325
After the merger, surrender, &c. of the estate of the original lessee, he may make a surrender to or accept a release in enlargement from the reversioner - - -	345
USES may be declared of a fine, already levied, or recovery already suffered - - - - -	42
Cannot be declared on a fine, unless the fine operates as a conveyance - - - - -	480
Cannot be declared of the estate of a termor for years or copyholder - - - - -	2, 272, 481
Uses declared of a fine operating on the equitable title will only charge the land by way of trust - - -	2
Declared of a fine to be levied, do not arise till the fine is levied - - - - -	5
Declared of a precedent fine or recovery, operate on the seisin of the conusee or recoveror, and not upon the resulting use of the owner - - - - -	4
Use of a fine or recovery till declared results to the former owner according to his ownership - - -	3, 26
A resulting use may be disposed of by any conveyance subsequent to the fine or recovery - - - - -	42

USES—continued.

Uses declared prior to a fine or recovery will not be controlled by any declaration subsequent to the fine when the agreement for the fine is pursued	42
Uses of a fine or recovery must be declared during the life-time and ownership of the persons levying the fine or suffering the recovery	26, 42
Uses declared in a conveyance to suffer a recovery cannot be varied without the consent of all persons concerned in interest	45, 46
Such consent must be expressed by matter equally solemn with that declaring the former uses	45
In a conveyance to uses operating immediately, although to be perfected by recovery or fine, the uses cannot be varied even with consent, but there must be a new conveyance	ib.
On a fine or conveyance made by tenant in tail, the resulting use, if any, will be to him in fee	64
Use will not result on a fine or recovery except in the absence of consideration and declared intention	65
The presumption of a resulting use on a fine rebutted by the conveyance being afterwards named tenant in a recovery	ib.
Uses may be declared by persons according to their aliquot parts or partial interests	74
Uses said uses cannot be raised on the seisin of a corporation	253
To raise uses there must be a seisin	264
Who may stand seised to an use	247, 251, 259, 262, 264
Uses cannot be declared on a release of right	275, 472
The use will result unless there be a consideration or intention	421
Observations on the declaration of uses in the release	473
General outline of the doctrine of uses	475
Of the necessity of a seisin to serve the use	480
The same person cannot be the owner and the cestui que use of the whole fee	481
A use cannot be declared upon an use already executed	482
The second use will be a mere trust	ib.
So of uses declared upon the estate of a bargainee in a bargain and sale under the statute of uses	483
And of the estate of an appointee in an appointment or under a power on	ib.
Otherwise if the bargain and sale or appointment is under a common-law authority	ib.
Of resulting uses	485
Sometimes the declaration of the use is in effect part of the limitation of the estate	481, 485
Inquiry whether the use will result to the releasor in absence of an express declaration of use	486

	Page.
USES—continued.	
No resulting use will arise on the assignment of a particular estate - - - - -	488
Resulting uses excepted out of the statute of frauds -	22
Of the different rules applicable to uses contrasted with the rules applicable to legal estates - - -	475

W.

WARRANT OF ATTORNEY. A person though not a party to the deed may be appointed attorney by the deed - - - - -	419
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WIFE. See *Feme Covert*.

THE END OF THE SECOND VOLUME.

